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REPORTS

OF

CASES

ADJUDGED IN THE

Court of King's Bench

From *Eaſter* Term 12 *Geo.* 3. to *Michaelmas*
14 *Geo.* 3. (both incluſive.)

With ſome ſelect Caſes

In the Court of Chancery,

AND

Of the Common Pleas,

WHICH ARE WITHIN THE SAME PERIOD.

TO WHICH IS ADDED,

THE CASE OF GENERAL WARRANTS,

AND

A COLLECTION OF MAXIMS.

By CAPEL LOFFT, ESQUIRE, of LINCOLN'S INN.

LONDON:
Printed by W. STRAHAN and M. WOODFALL, Law Printers to
His Majeſty.
And publiſhed by WILLIAM OWEN, in *Fleet-Street.*
MDCCLXXVI.

G.R. III
BRITISH MUSEUM

PREFACE.

FROM the excellence of our conſtitution, the dignity of our laws, the abilities of thoſe by whom they are adminiſtred, and the learning and authority of our reporters, through a long ſeries of ages, and of ſome yet living, I feel much awe in revolving within my own mind, and ſtill more in offering to the profeſſion, and ſubmitting to public examination, the collection of caſes contained in the enſuing ſheets. But all theſe circumſtances, though they heighten the difficulty, yet heighten the deſire; and I ſhould hope would tend to excuſe the ſucceſs of the attempt, if it ſhould be inadequate to my wiſhes.

And though a preface is generally deſigned as an apology for the work, and therefore ought not to want an apology itſelf, yet, before I proceed farther, I ſhould wiſh to obviate any prejudices which my reader may entertain, even from this preface, which he can hardly be more ſenſible than myſelf to be much inferior to the gravity and dignity of the ſubject. Indeed upon other terms I muſt not have written any. The ſentiments of a young and private man bear too wide a diſproportion to thoſe which I have to offer in the body of the work. And they will do ill, if there are any, who ſhall judge from the weakneſs of my own thoughts of the ſtrength of thoſe which are not properly my own. And if I ſhall appear to have expatiated warmly here, they will recollect I do not pretend to ſpeak to them beyond: And that where one loves, be the object however worthy, (and what can eaſily be found more worthy of love and admiration than the voice of our laws ſpeaking to us in judgment) the meaſure of what is ſaid is apt to proceed rather from affection than ſtrict rule; more from what one *feels* than from what is *neceſſary*.

However, if any thing in this preface ſhall be thought to approach, though at a great diſtance, to the weight and importance of the occaſion, it will anſwer my wiſhes; the much that falls ſhort meaſures with my ability: But neither the one nor the other will affect the CASES themſelves, and the POINTS of LAW, which is not merely the *principal* but the *only* thing in this volume in which I venture to aſk for my reader's attention; of whoſe candour I deſire now to be heard with indulgence of the motives which have induced me to an undertaking of ſome labour; and in which the perſon attempting, the attempt itſelf, and the execution, muſt owe much to a favourable interpretation.

As an *Engliſhman* I cannot help loving and revering the laws of my country; as *a member of the profeſſion* of the *law* I am attempting to diſcharge a debt which Lord *Bacon* ſays every man incurs to his profeſſion; and, as I cannot pay it of mine own, to pay it in that coin which I have endeavoured to treaſure up in the courſe of my attendance on the courts: As *a man* it were a ſhame if I could contemplate with coldneſs and indifference *thoſe laws* which have made the beſt proviſion for the rights of humanity; are the general admiration of mankind, and the common ſupport and protection of *natives*, *denizens*, *and aliens*; nay, as far as may conſiſt with the public ſafety, of *enemies* living beneath their ſhadow. *Laws*—at which the breaſts of philoſophers have burned with rapture! Which gladden the heart of the peaſant in his cottage, knowing himſelf not beneath their defence. Thoſe benign and venerable laws which add glory, ſtability, and happineſs to the THRONE; make the *Noble* greater and more unenvied in his dignity; give power to *all*, for their own ſecurity, and the ſervice of the public; but for oppreſſion to *none*. Thoſe LAWS which the moſt acute ſagacity has been employed to inveſtigate, and which the moſt ſevere judgment has approved with admiration; which four hundred years ago had the encomium from an hiſtorian not enthuſiaſtic in his praiſes, a foreigner, and of an hoſtile country, as the BEST LAWS for PRINCE and PEOPLE: Which reſult from a conſtitution which one of the wiſeſt hiſtorians of antiquity had pronounced muſt be the beſt; "a compoſition of the three ſimple forms "of other governments; which conſtitution the *Athenian* teacher of wiſdom had defined by anticipation "a "monarchy ſubſiſting in laws;" which the noble orator, philoſopher, and ſenator of *Rome* had recognized as the moſt excellent, from the mild ſeverity and equitable juſtice which would flow from it; and which a politician, eſteemed the deepeſt of antiquity, has delineated after their traces, and appears only to have been miſtaken in thinking it too highly finiſhed and too delicately tempered to be permanent: A miſtake which the experience of ages has refuted, and which ages more may refute. Thoſe LAWS and that CONSTITUTION which have their roots in the abyſs of unfathomable antiquity, their branches over the mighty empire which, under Providence, they formed and preſerved—and which grew, from ſuch a ſyſtem of liberty, juſtice, peace, concord, and order, double that of the *Roman*, in its utmoſt extent—and their head in heaven: Thoſe laws and that conſtitution which neither the blind ambition, nor the miſtaken counſels, nor the unhappy fortune of kings, the pride and contention of our ancient nobles, the dark ſtorm of ſuperſtition, the waves and ſea of popular fury, nor the mining of time, nor the lightnings of war, darted on *Britain* by united enemies, each ſingly formidable to any other ſtate, and ſtrong in our domeſtic diſſenſions, have now for ages been able to deſtroy. Deſtroy? The ſhock of ages, tyranny, ſuperſtition, popular madneſs, all in their turn contributed to mature their perfection, to ſtrike them forth in their meridian luſtre, to clear the obſcure, retrench the weak and ſuperfluous, aboliſh the dangerous, ſtrengthen the beſt; and erect a model of legal liberty for the inſtruction and benefit of mankind, as well as the delight and wonder and bleſſing of *Engliſhmen:* For which not only ſo many heroes have died in the field or bled upon the ſcaffold, but ſo many of the firſt abilities and integrity have toiled through a life of labour, of danger, and often with public calumny for their reward, upon the *Bench*, to preſerve them; ſo many to frame them, adjuſt their proportions, direct their uſes, and connect new parts from time to time, as occaſion demanded, to the general ſyſtem, in the *Senate*—I wrong my country in borrowing an imperfect name from immortal *Rome*—in the PARLIAMENT of ENGLAND; which, when it really repreſents the people, and juſtly executes its exalted truſt, may look down on all other human inſtitutions with a conſcious ſuperiority, and compaſſion for their imperfections.

I take laws amongſt men, in the idea in which they appear to me moſt perfect, to be regulations of ſociety to which the members are bound to ſubmit, as being *neceſſary* for the liberty and happineſs of the *community*, agreeable to reaſon and the divine law, and ſupported by ſuch reſtraints and penalties *only* as are *indiſpenſibly* requiſite for the end of the *public ſecurity and welfare*, and founded either on the expreſs conſent of all who are to be bound by them, or virtually by thoſe whom they freely chooſe and depute to conſent for them. Any reader will judge how this will apply to our conſtitution, and what degree of praiſe that conſtitution merits if it does apply.

Let my veneration for this conſtitution plead my excuſe in the bold attempt I have hazarded of publiſhing theſe caſes.

I had intended to call them ſimply a collection of caſes, being ſenſible that none are *properly* REPORTS but ſuch as are publiſhed by authority, or are the judgments of learned and reverend judges, committed to the public by themſelves.

But as reports of caſes is grown a familiar name in the titles of books, at many different periods, I have not avoided the *name*, ſince, though I pretend to *no authority*, it is an additional *pledge* of that fidelity to which I *do* pretend; and which I am *bound* by intereſt and duty to *preſerve*.

JUDGMENTS, it is true, as the GREAT SIR MATTHEW HALE obſerves, are *but* EVIDENCE of *law*, and not LAW; yet, as he ſubjoins, they are the HIGHEST EVIDENCE: And it would be very impertinent for me to obſerve what weight the judgments given within the period comprehended in this book ought to carry with them. I know that it is felt and acknowledged.

But as JUDGMENTS are but *evidence* of law, REPORTS are but *evidence* of judgments; and ſtand, therefore, a ſtep *lower*. Yet farther, I muſt deſcend ſtill *another* ſtep, and freely confeſs, what my reader would have underſtood perfectly without me, that theſe reports are *far* from the *beſt* evidence of theſe judgments. But with this I can aſſure him (and I know I muſt ſpeak to thoſe who are beſt able, and were moſt concerned, and bound to refute me, if I were ſpeaking falſely, and whoſe cenſure, as I ſhould in the higheſt degree merit, I could leaſt ſuſtain) that I have not *wilfully miſrepreſented* or *neglected* any of thoſe judgments. They are *all* within the memory of almoſt the whole *bar*, and of all the *judges* who delivered them; of whom the public has loſt *none*, having ſuffered only (and there greatly indeed) in the Exchequer, in which court none of the notes of the caſes in this book were taken.

Still how ſhall I reply to the objection which muſt be made, that when I acknowledge the difficulty and the importance of ſuch a work, and the extraordinary merit of thoſe who have been engaged in it before me, I ſhould preſume to undertake it?

I muſt partly anſwer, that many of theſe learned and excellent men are now no more upon earth; and that I am ſure, valuable as their labours were, they would have ſooner burned them than have ſuppreſſed the efforts of induſtry in the profeſſion, which they loved and honoured, which they adorned and ſo much benefited by publiſhing their works, if they had conſidered it as a prohibition to poſterity to attempt a labour in which they had thus excelled. The beſt ſingle work of genius and learning would be bought too dear if it were to deter all ſubſequent ages from an endeavour to do any thing of a like nature. One could have reſigned an *Homer*, or even (which perhaps is more) *Shakeſpeare*, if they were to be enjoyed upon the hard terms of ſilencing all inferior efforts. Becauſe there has been a *Raphael*, a *Vandyck*, a *Corregio*, a *Titian*, was it fit that painting ſhould be at a ſtand? Or ſhould ſculpture drop the chiſſel becauſe there had been a *Phidias*, an *Angelo*, a *Roubilliac*? There would not have been theſe progreſſive honours for that art to boaſt if artiſts had reaſoned thus: And when there has been a *Roubilliac* every man has a right to be as near him as he can; or to excel him if he is able: And though he ſhould be ſatisfied he could never do this, there is yet room for fame in a much inferior degree of excellence. Should we have no muſic becauſe there has been an *Handel* and a *Purcel?* or live without houſes or churches becauſe there has been *Vitruvius*, *Jones*, and *Wren?* or have no phyſicians becauſe we have had *Sydenham* and *Meade?* or no hiſtory becauſe there has been *Herodotus*, *Livy*, *De Thou*, *Clarendon?* or have no legiſlators or judges becauſe there has been a *Solon*, an *Alfred*; an *Hale*, an *Holt?* or no defence becauſe we were once defended by *Drake*, *Vernon*, *Boſcawen*, *Marlborough*, *Wolfe?* or no philoſophy becauſe we had *Bacon*, *Boyle*, and *Newton?* or ſhall there be no chriſtians becauſe there was once primitive chriſtianity? or rather the more excellent and uſeful any thing is ought not the labour to be the more general in thoſe whoſe ſtudy and opportunities are any way adapted to it? And if we allow encouragement to ſecond, third, and much lower claſſes, in works even of pleaſure and imagination, ought not a man to expect the ſame indulgence who is bringing ſomething to the ſtock of the public uſe, where, if he fall ſhort of any conſiderable ſame, he may yet do ſervice?

Indeed, ſuch reſtrictions would do much worſe than exclude me; nor ſhould we have had that excellent living reporter, whoſe works make my apology the moſt difficult, if he had reſolved that becauſe ſo much had been done admirably it would be wrong to attempt doing any thing well for the future.

But I am now to ſpeak in anſwer to that objection of the *living* reporters. I don't know that there ever were fewer ſince the beginning of the year-books, now above four centuries and an half: And I gladly acknowledge their merit as remarkable as the ſmallneſs of their numbers. But if one *bad* reporter ſhould be added it would be his own loſs and misfortune; if you will his folly—or, if you chooſe to ſay—his crime; it *can* be no prejudice to the *good:* But if the caſes I have to offer ſer ſhall turn out not ſo bad (as I am ſure it will be my own fault if they are not far from uſeleſs, conſidering who were the judges, what the queſtions, and what have been the deciſions) I flatter myſelf it will be a pleaſure to them that their labours have encouraged a young man to labour in his profeſſion; with unequal powers, but not with little induſtry; nor, he hopes, it will appear, with little fidelity.

But the great ſtreſs will be, that theſe caſes are *principally* in the King's Bench, and the public have aſſurance they may expect them from a reporter whom they highly value from experience. I am glad that they do expect them: I ſhould be ſorry they were to truſt to my little ſkiff only to conduct them through the ocean of legal knowledge, vaſt for ages back, and ſo widely extended in modern times. But I am ſure *that* reporter is too well *eſtabliſhed* and too well *deſerving* to be hurt by this work of mine: And I am as far from the *madneſs* of expecting as thoſe who know me will be convinced I am from the *malignity* of wiſhing it. There have been concurrent reporters for a long time back; ſo that I hope, whatever reporters there are, and however excellent, there is room for me, without injury to the living or the dead. And though I might have much more reaſon to fear than I can give cauſe of umbrage, I wiſh that my fellow labourers in the vineyard may rather *all* exert themſelves than that *one* ſhould be kept out.

I do not apologize, therefore, to any gentleman who has reported or means to report any caſes which I have taken; I think it would be more arrogant than humble if I ſhould; neither do I apologize with the public; none of whom are bound to be purchaſors of any book; nor, when they have purchaſed it, to form any other opinion than their own judgment ſhall enable them and their temper diſpoſe them to form. I cannot apologize to the public for endeavouring to ſerve them in ſome way or other—it were more than infamous in any man not to endeavour it: And I thought I could not attempt to ſerve them in a more natural or leſs oſtentatious manner than in the way of my profeſſion, and by giving them not my own thoughts and opinions, which I ſhall be ſparing to do till I think they may deſerve their notice, but the thoughts, opinions, and judgments of thoſe who, I am ſure, *muſt* deſerve and are ſecure of their notice, and upon matters of the higheſt importance and moſt public concern, as to *ſome* of theſe caſes, and of concern to the *profeſſion*, more or leſs, I hope, as to *all*; if it be true that the ſmalleſt degree of legal knowledge ought not to be neglected.

In point of fact, too, I muſt obſerve this, that in a few years conſtant attendance I have hardly known a caſe of any importance, either in law or equity, ſettled upon the authority of a ſingle reporter, however eminent and reſpectable; but that I have known (and there are many who know it better) numbers of caſes, where an obſcure point in one reporter, though of no ordinary merit, has been made clear by reference to another, where the true giſt of the queſtion has been aſcertained, and the true reaſons of the judgments, by lights drawn from the *concurrence*, nay, ſometimes, from the *oppoſition* of various reporters. And I need not ſay that a very ſtrong part of the evidence which we have for the moſt important and moſt certain of all hiſtories ariſes from the independent teſtimony of diſtinct reporters, contained in a volume too ſacred to be named with this.

I would now deſire to ſpeak ſomething of the general conduct and deſign of the work I have attempted.

In caſes of importance thoſe who have attended the courts will not be ſurprized if, beſides the *ſubſtance*, I have often been ſtruck with the *form* of an argument; the *exordium*, connexion, and cloſe: And they will at leaſt excuſe, I flatter myſelf, the attempt which I have ſometimes made of retaining as much as I conveniently might, and was able, even of theſe which if not ſtrictly neceſſary appeared graceful, and, as all juſt ornaments always are, ſubſervient to uſe. I have obſerved in ſome of the greater arguments that ſtructure and compoſition, perſpicuous order, and elegant dependency of which I am ſenſible much is loſt, by the unavoidable contraction of the argument, in many inſtances by the omiſſion ſometimes of the words of the ſpeaker, and the uſe of others leſs apt of my own; and by other cauſes—not the leaſt of which will be, that you cannot *hear* the ſpeakers, but muſt be content to read.

This however, I am ſure, if I could have tranſmitted the pleadings as they were ſpoken, I ſhould eaſily have juſtified myſelf in more inſtances than one, to a great part of my readers, notwithſtanding the length. I think, I ſhould have attained, what Lord BACON obſerves, in his preface to his law arguments, is wanting in the more compendious method, a delineation, and tracing out a form of argument, which the younger ſtudents might imitate with pleaſure and advantage. For the law is injured if it be thought ſo dry and jejune a ſtudy as ſome have ſuppoſed; on the contrary I hope, it is generally allowed to be a liberal, a noble, and a very extenſive ſcience, nearly connected with the other arts and ſciences in general; however remote ſome of them may appear: Since nothing that raiſes the mind, extends the imagination, informs the judgment or rectifies the will, nothing virtuous, nothing wiſe, nothing graceful can be unſuitable to the character of an *Engliſh* lawyer: Who is properly defined by Lord *Holt*, a *miniſter* of *right* and *juſtice*; who by the very MAXIMS of his profeſſion is to be above mercenary and ſordid intereſts;

reſts; and who is admitted to the fulleſt and moſt diſtinct view of our laws, the accumulated wiſdom of above a thouſand years, and of the wonderful and divine fabric (I think, I cannot ſay too much, when I call it divine) of this our conſtitution. Nor, particularly, can a chaſte and manly eloquence miſbecome him; which *muſt* be *uſeful*; for none teach ſo forcibly, ſo fully, ſo immediately, as thoſe who can moſt *agreeably* perſuade; if they will apply thoſe powers of perſuaſion to their *proper* end. I hope theſe obſervations will not be imputed as vanity to the maker of them, who ſpeaks of the profeſſion with more love and ſincerity as I readily again confeſs, than either abilities or need;—or perhaps policy with regard to his perſonal reputation, which might rather have been ſerved by not ſo free an avowal that he ſees that excellence which he can *only* ſee. But if little appears here of the *grace* of theſe arguments, the fullneſs of them in ſome inſtances may contribute to their uſe; and where I have taken *too much* it will be no hurt to my *readers judgment* to reject the *ſuperfluous*; if I had taken too little by truſting to my own I ſhould have paid myſelf a compliment with little coſts; but perhaps not much to his ſatisfaction.

Senſible, how much more the dialogue ſtrikes one than bare narrative, I have generally preferred it to ſaying this or that advocate ſaid thus or thus. And frequently, when I have begun obliquely in the form of narrative, I have broken off where the paſſage ſtruck me and continued the argument in the perſon of the ſpeaker, hoping that my readers will be affected as I have been, and be moſt pleaſed when they have occaſion to think leaſt of the reporter and moſt of the ſpeaker; in argument, but particularly in the judgment.

There will be found inaccuracies in my language, I doubt not; of ſome I am conſcious; others may have eſcaped me. I would wiſh any who might read theſe pages to find as few defects of this kind as may be; but where they do find them, I hope they will not reject the ſubſtance becauſe they diſlike the form; or ſay this is inaccurate, and therefore the judge could never ſay it:—But examine whether it be juſtice, law, and reaſon; examine whether in *fact* (which they may eaſily know in ſuch recent caſes) the principle was laid down; and then they have my full leave to place the inaccuracy to my account, if they will place the good ſenſe, law and authority, to the account of thoſe to whom it belongs.

With reſpect to orthography, the reader may obſerve ſome words originally *Latin* derived through the medium of the *French*, ſpelt with the characteriſtic *u*; and ſometimes the ſame words without—I have omitted the *d* ſometimes in priviledge and alledge and ſuch words; and ſometimes inſerted it. I hope neither party will be angry, as I have done my beſt to pleaſe both in a matter which I think perfectly innocent, and in which, much may be ſaid on both ſides.

But now to return to the ſubſtance—I own I have thought Lord *Holt*'s modeſty made him almoſt *unjuſt*, when he ſuppoſed that thoſe ſcambling reports which he mentions, would make poſterity think ill of his underſtanding and that of his brethren on the bench. For my own part, I do not think I ſhall utter any abſurdities in reporting the judgments of the caſes; becauſe I think, I ſhall ſay nothing in ſubſtance but what was ſaid by the court; but if I ſhould, I know where the blame will lie: And it is eaſier and readier for me to expect poſterity will think I was a blockhead, than it will to make the moſt remote ages of poſterity forget who were the judges who preſided during the period included in theſe notes; and while they ſhall remember *that*, I have no fear that any miſtakes of mine ſhall do their memory a wrong; and yet, I have done a good deal to avoid any.

The arguments, except where the caſe was new or very important, will be found generally not long: Though I did not chooſe to omit them even in ſmaller caſes; becauſe they lead the mind to conſider and underſtand the point of deciſion.

The JUDGMENTS are taken generally at large; and often almoſt *verbatim*. And though I have uſed ſhort-hand for almoſt all the notes, I hope I ſhall not be thought prolix in the manner in which I have taken them.

I own the authority of the venerable PLOWDEN, and of the author of the REPORTS, which by way of eminence are ſo called, weighed with me greatly: And I wiſh they had an effect on the *execution* proportionable to that which they had upon the *deſign*; and had enabled me to reach the mark as they excited me to aim at it, and ſhewed me where it ſtood, having indeed for their part erected it on ſo admirable a foundation, on ſo fair an eminence, and ſo much to the ornament and benefit of the profeſſion.

In them you will find the JUDGMENTS *exact* in form, the *reaſons* and principles *entire*, their force, dependence, and connexion preſerved; and even in *collateral* points a vaſt magazine of learning, beſides that which enriches them in direct application to the principal matter. For they thought of law and decided it not as a matter of *memory*, but as a ſcience; and therefore did not conſider *bare unconnected facts*, generally, and diveſted of their particular circumſtances, but were accurate and curious in obſerving the diſtinctions, qualifications, and exceptions in the application of general rules to particular caſes; they looked not on the ſhell and corpſe, but on the *ſoul* of the law: Yet they were fond of general rules as the parents of certainty; but they kept them within their limits ſo as not to work an abſurdity or *injuſtice*, and ſometimes raiſed particular rules into general, ſo far as the reaſons were general. The law is ſtill conſidered as a ſcience and decided on *ſimilar* principles, and, as I have heard a learned and eminent practicer affirm, much the greater part of COKE is yet law; ſo much indeed as almoſt the *whole*. And yet thoſe who go not back to the ſource, are apt to ſuppoſe that our modern law is a thing of yeſterday, whereas the ſtatutes have made the principal alterations, and that rather in particulars than generals. But common-law ſtill prevails in a very conſiderable extent, and, as was truly ſaid in the time of *Edw.* 4th, is as old as the *world*; being no other than common ſenſe and juſtice brought down indeed, and applied, to particular circumſtances of our policy and conſtitution, which have given riſe to *rules* long ſince *ſettled*. And you hardly ever hear at this day a diſpute about principles of common law, almoſt infinite as they are, but about the *application* of them to the caſe in queſtion.

And at this time law is conſidered in a more complicated and extenſive view than perhaps ever before, from the encreaſe of ſtatutes, the growth of arts and commerce, the various diſpoſitions of property, and the fraud and violence reſulting from ſo many jarring intereſts and paſſions, as are the growth of a wealthy and civilized ſociety, in which both virtues and vices have a larger ſcope, and vices particularly a more *viſible* and *formidable* operation. In ſuch a ſtate therefore, when the law of *commerce*, of general policy, and of *nations*, is become ſo large a part of the law of *England*, when precedents and caſes are ſo multiplied, and furniſh ſuch a labyrinth of argument, it is not merely of curioſity but of *neceſſity* to ſee why, by what rules of law, by what application of precedents, with what limitations and under what circumſtances, a particular caſe was decided; and not ſimply the heads of the caſe, and on what ſide judgment was given. And I obſerve this fullneſs with regard to the circumſtances of the caſe and reaſons of the judgment has been adopted by one of the lateſt of our reporters, and one of the beſt of this or any time.

And to endeavour after theſe examples is doubtleſs right, and I hope not uſeleſs though one fall far ſhort.

I do not mean, in ſpeaking of reaſons and principles, that caſes reſt, or ought to reſt, upon the refinements of arbitrary vague and private reaſon; but I mean that there are many caſes (moſt indeed upon wills) that fall under no expreſs precedents, or particular proviſion, but which principles and analogy *muſt* govern: And that when precedents *do* apply, it is not uſeleſs to obſerve to what extent and in what manner; leſt we ſhould miſtake the *true* principles of the deciſion, and under the ſhadow of *imaginary* precedents wander into error and deluſion.

The caſes in this collection, with that of a ſecond volume preparing for the preſs, which are ſomewhat particular, are theſe: The caſe of General Warrants; the *Negro* cauſe, and the caſe of *Lee* and *Ganſel*; the one pointing the extent of *perſonal* liberty in this country, the other of *legal* coercion—The *Minorca* cauſe, in which the extenſive privileges of the *Britiſh* conſtitution to protect any ſingle individual from arbitrary puniſhment, by any power in any part of the empire, were ſtrongly manifeſted; the *Grenada* cauſe, which aſſerted the liberty of an whole iſland in a very material point; the caſe of *Bolt* and *Purvis* concerning the priviledges of the *Eaſt India* Company, and the judgment in the caſe of corruption in the *Hindon* election, in which the fundamental principle of our conſtitution was vindicated.—And of more private cauſes, the caſe of *Clark* and *Johnſon* on a gaming contract of a ſervant with his maſter's money, whether the maſter ſhall bring the action and have the evidence of the ſervant; the two remarkable bankruptcy caſes of *Spotwood* and *Grey*, and of *Fiſher* and *Fordyce*; with a late very particular one determined in *Eaſter* term laſt 1776; the caſe of *Jewſon* and *Read* on the cuſtom of *London*; the caſe of *Martin* and *Hynde* laſt *Eaſter* term, on the engagement of the rector to the biſhop, for providing a competent ſubſiſtence for his curate; the caſe of non-reſidence the ſame term; the determination of the court of King's Bench how far, and upon what terms a diſcovery ſhall entitle the party diſcovering, to bail or to diſcharge, in the caſe of Mrs. *Rudd*; the caſe of *Morgan* and *Jones*; the caſe of revocation on Mr. *Lacy*'s will; *Eyre* and *Popham* on ſpecific performance; *Hatton* and *Hooley* on double legacies; the caſe of election on general *Pulteney*'s will; *Vallejio* and *Wheeler* on barratry; the caſes of croſs remainders, or *Burville* and *Burville*, and *Wright* and *Holford*.—And others.

I flatter myſelf the example of SIR JAMES BURROW, and the ſincerity of my intention will be my ſhield, from the diſpleaſure of thoſe high and honourable courts whoſe deciſions I have taken; and ſo far as I ſhall appear to have done it honeſtly, I hope for ſome degree of their approbation: If in any reſpect I have done otherwiſe, the caſes are too recent for me to paſs unobſerved or uncondemned; though were I not confident that I ſtand clear of this, my own heart would be my heavieſt condemnation.

I have ſaid thus much of the reaſons which have induced me to the publiſhing of theſe caſes; of the aſſurance I have that I ſhall not be judged unexamined, and that when examined, my worſt cenſure will be that my intention was better than my power. I ſtand rather early in life for ſuch an attempt, and but juſt beyond the threſhold of my poſſeſſion; I have juſt mentioned ſome of the moſt material cauſes, and the manner in which I mean to report them. I ſubmit the whole reſpectfully, not with confidence, but with a contented hope, to the judgment of the profeſſion, in a caſe where I have nothing to hope, but according to the truth and fidelity with which I ſhall appear to have acted; and the degree of uſe in which they may ſerve the profeſſion muſt meaſure, in a great proportion, what advantage or reputation the author may expect. Of ſome degree of reputation, he owns he is ambitious: He thinks it not an illiberal nor a diſengenuous profeſſion, that he wiſhes ſome encreaſe of honeſt eſtimation, in due ſeaſon, and with proper aſſiduity, in that line of life, in which duty and his inclination have prompted him to labour. But even more than he can wiſh for an honeſt ſucceſs and credit, in the path and duties of his profeſſion does he pray that Providence may avert from him and that profeſſion, the obtaining or deſiring of that ſucceſs diſhoneſtly. This at leaſt he is ſure, that there are other paths to ſucceſs (whether he ſucceeds in them or not) than fraud and indirection; ſince, notwithſtanding the common ſlander on the three profeſſions, they have all (and not leaſt the law) been diſſtinguiſhed in all times by men who have advanced conſtantly in their integrity, have preſerved it in the higheſt honours, and preferred it to thoſe honours, to their fortunes, lives, and every earthly endearment when they came in competition. And thanks to the vigilance of the judges, the ſanctity of our laws, and the wholeſome ſeverity of juſtice, there is little encouragement to any who would underprop a villainous deſign by baſe, unworthy, and ſcandalous artifices: And while all fair diligence is honoured in every cauſe, they will conſider what reaſon there is to imagine that diſhoneſt or iniquitous inventions will be proſperous or endured in any.

I have ſeen many inſtances in the few years obſervation I could make to perſuade me, that the conduct which beſt becomes a liberal and an honeſt man, is generally moſt ſerviceable both to the client and thoſe concerned for him: And whatever in theſe notes may tend to communicate any uſeful precedents, to the furtherance of juſtice, the diſcouragement of iniquity, the honour of the laws, and conſequently of the profeſſion and public, I ſhall be happy to have imparted. The reader will *judge*; it is my buſineſs only to *report*, and to wiſh that ſo much and no more may receive his approbation as ſhall really, in any reſpect, deſerve it.

Lincoln's Inn,
1 *Aug*. 1776.

CAPEL LOFFT.

THE

THE
CHANCELLOR, JUDGES,
And others PRINCIPAL in RANK
IN THE
PROFESSION,
At the Time of this Publication.

THE Right Honourable *Henry* EARL *Bathurſt*, LORD HIGH CHANCELLOR OF GREAT BRITAIN.

The Right Honourable *William* EARL of *Manſfield*, LORD CHIEF JUSTICE OF THE KING'S BENCH.*

The Right Honourable Sir *Thomas Sewell*, MASTER OF THE ROLLS.

The Right Honourable Sir *William De Grey*, LORD CHIEF JUSTICE OF THE COMMON PLEAS.

The Honourable Sir *Sidney Stafford Smythe*, LORD CHIEF BARON OF THE EXCHEQUER.

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Sir *Henry Gould*,	C. B.
Sir *James Eyre*,	Sc.
Edward Willes, Eſquire;	B. R.
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Sir *Beaumont Hotham*,	Sc.
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Sir *Richard Perryn*,	Sc.

---

* *Note*, The antient ſtile of the Chief Juſtice of the King's Bench, which is *Lord Chief Juſtice of England*. Vide 37 *H.* 8. *c.* 12. 5 *E.* 6. *c.* 11. *ſ.* 8. and ſo the juriſdiction runs to this day.

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Charles Ambler, Eſq; M. P. Sollicitor-General.
Richard Jackſon, M. P.
James Wallace, M. P.
Gryffid Price,
John Skynner, M. P. one of the Judges of the Grand Seſſions of *Wales*,
Francis Cockayne Cuſt, M. P.
George Lewis Newnham, M. P.
James Mansfield,
Edward Bearcroft,
John Maddox, Eſq;

Maſter of the Crown Office Sir *James Burrow*.

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The following ERRATA, the Reader is requeſted to excuſe and correct.

Page 21. for caſes, *r.* caſe. p. 85. *for* any, *r.* either. for *Harcourt* p. 315. *Tremaine* r. *Harcourt*—*Tremaine* p. 315. p. 130 dele caſes, and inſert after deviſee. p. 131. *for* redemption, *r.* ademption. p. 161. l. 21 *for* mail, *r.* male. p. 194. *for* and to pay, *r.* and plaintiff to pay, inſert after 200*l.* and to find ſecurity for the ſame l. 19. firſt l. of caſe of Cov. *for* plaintiffs, *r.* defendants. p. 205. maxim at the bottom *for* indicis, *r.* judicis. p. 234 *dele* not. p. 282. for *Mary r. Frances.* p. 384. *for* judmgent *r.* judgement. p. 385. for *eſt* r. *et.* for contrary *r. contra.* p. 398. in the marginal note for “ will not carry eſtates not expreſſed in the premiſſes,” *r.* will not carry eſtates of a different nature from thoſe &c. p. 466. inſtead of the words “ a friend” *r.* Mr. *S.* 466. l. 16. after “ will” *r.* the will was ſent; but teſtator was out his ſenſes before the attorney came. p. 472. *for* 1,7000. *r.* 1700. after “ deſerves” put a. In the note at the bottom of p. 486. l. 4. *for Fordyce* r. *Fiſhar.* in the ſame note *for* 5,300 *r.* 5500. p. 492. *for* obligators *r.* obligors. p. 493. *for* his ſervice, *r.* his former ſervice. p. 507. *for* exiſtence by the deed *r.* of the deed; *for* authentically *r.* identically. p. 532. *for* “ but “ upon payment” *r.* “ after payment over.” p. 535. *for* 5 & 6 *E.* 3. *r.* 5 & 6 *E.* 6. *dele* the note at the bottom of p. 557. p. 604. inſtead of wife’s time *r.* life time. p. 618. *for* raiſing *r.* racing. p. 631. *for Vallezjo* and *Echalai,* r. *Vallejo* and *Echalaz.* p. 756. continue inverted commas down to demand. p. 636. for *notis* r. *notabil.* p. 758. for *conditio* r. *condictio.* In the preface to the maxims *after* ejus *put* a, *and* dele *after* principia; *after* ſublapſa *put* a ſemicolon. *after* eſſe *inſert* quo. p. 2. *after* galliarum *dele* comma, *and place after* res. *after* æquitatis *for* . *put* ; *after* intima *dele the* full point. p. 4. poteſtatem *inſert* tam. *for* ſociatam *r.* ſociatum. *for* conſenſuæ *r.* conſenſu. p. 5. *after* turbidas *dele the* full point *and place* comma. *after* ſumma *place* ſemicolon. *after* viderentur full point. *for* ſexcentis *r.* quingenis. *after* comperio *for* comma *place a* colon. *after* regulas *a* colon. *after* oſtendere *a* full point. *after* Deus full point. *for* inutile *r.* inutilem *and place a* full point. *after* hauſtum *a* colon. p. 6. *after* rationem *a* ſemicolon. *for* toga *r.* togæ *after* lingua.—*after* remotiorem *inſert* dico. *after* fuit *a* ſemicolon. *after* paro *a* colon. p. 7. *after* oro *a* ſemicolon. *after* complectar *a* ſemicolon. In the table of maxims; maxim 7. *for* legis *r.* juris. maxim 11. *after* ad *r.* ea. maxim 24. *after* habendus *a* ſemicolon. *after* tenent *a* colon. maxim 25. *after* tenetur *a* ſemicolon. maxim 41. *r.* reſcindi. maxim 46. *after* exitium *a* ſemicolon. maxim 86. *after* acceptiſſima *a* ſemicolon. *after* claudicare *a* colon. maxim 154. dele. maxim 205. *for* auget *r.* detegit. maxim 255. *dele.* maxim 304. *dele* In. maxim 360. *after* genere *inſert* æque. maxim 445. *r.* tamen ſi mali ſit &c. 576. *dele.* maxim 584. *for* valit *r.* valet. Alſo p. 644. *for* barratrare *r.* barrattare.

And add this note, barrattare to cheat, barrattare una mercanzia to run a commodity Baretti’s It. Dict. p. 93. after given a comma for a ſemicolon. p. 176. in the note inſert *B.* 3. p. 457. *for* 1834 *r.* 1867. p. 123. *Trebonius* r. *Tribonianus.* In the Table of Contents, Title Revocation for “ general deviſe” *r.* general deviſee and dele the ſemicolon.

DIRECTIONS to the BINDER.

The Engliſh Preface is to follow the Title Page, and then the Chronological and Alphabetical Tables;

Then the Caſe of *John Wilkes*, Eſq; againſt *Wood*; and then the other Caſes from *Somerſet* againſt *Stewart*, to Page 814.

Then follows the Latin Preface, and after it the Collection of Maxims.

Laſtly, the Table of Contents, according to the Alphabetical order.

Michaelmas

Michaelmas Term

3 Geo. 3. 1763. C. B.

Note, *This caſe was not taken by myſelf, but communicated by the favour of a gentleman to whom I am much obliged, and whoſe permiſſion I have to publiſh it.*

John Wilkes Eſq; *againſt* Wood.

THE CASE of GENERAL WARRANTS.

AT the court of *Common Pleas*, at *Weſtminſter*. Sittings after *Michaelmas* term, before Lord Chief Juſtice *Pratt*, John *Wilkes*, Eſq; plaintiff; *Robert Wood*, Eſq; defendant.

Middleſex to wit, 6th of December 1763.

In an action of treſpaſs, for entering the plaintiff's houſe, breaking his locks, and ſeizing his papers, *&c.*

The plaintiff's counſel were—

Serjeant *Glyn*, Mr. Recorder *Eyre*, Mr. *Stow*, Mr. *Wallace*, Mr. *Dunning*, Mr. *Gardiner*.

The defendant's counſel were—

Solicitor-General *Norton*, Serjeant *Nares*, Serjeant *Davy*, Serjeant *Yeates*. Attorney for the plaintiff, Mr. *Phillips* of *Cecil-ſtreet*.

For the defendant—

Philip Cartaret Webb, Eſq; Solicitor to the Treaſury, and Mr. Secondary *Barnes*.

The ſpecial jury—

Plukenet Woodroffe, Eſq; of *Chiſwick*; *William Baker*, Eſq; of *Iſleworth*; *William Clarke*, Eſq; of *Edmonton*; *James Gould*, Eſq; of *Edmonton*; *Stephen Pitt*, Eſq; of *Kenſington*; *Nathaniel Turner*, Eſq; of *Hampſtead*; *Jonathan Richardſon*, Eſq; of *Queen-Square*; *John Weſton*, Eſq; of *Hatton-Garden*; *Harry Blunt*, Eſq; of *Hatton-Garden*; *Henry Boſtock*, Eſq; of *Hatton-Garden*; *John Boldero*, Eſq; of *Hatton-Garden*; *John Egerton*, Eſq; of St. *John's-ſtreet*.

Mr. *Gardener* opened the caſe, with declaring the foundation, that on the 30th of *April* laſt, Mr. *Wood*, with ſeveral of the king's meſſengers, and a conſtable, entered Mr *Wilkes*'s houſe; that Mr. *Wood* was aiding and aſſiſting to the meſſengers, and gave directions concerning breaking open Mr. *Wilkes*'s locks, and ſeizing his papers, *&c.* for which Mr. *Wilkes* laid his *damages* at *five thouſand* pounds.

Serjeant *Glynn*, then enlarged fully, on the particular circumſtances of the caſe, but remarked that the caſe extended far beyond Mr. *Wilkes* perſonally, that it touched the liberty of every ſubject of this country, and, if found to be legal, would ſhake that moſt precious inheritance of *Engliſhmen*. In vain has our houſe been declared, by the law, our aſylum and defence, if it is capable of being entered, upon any frivolous or no pretence at all, by a ſecretary of ſtate. Mr. *Wilkes*, unconvicted of any offence, has undergone the puniſhment. That of all offences that of a ſeizure of papers was the leaſt capable of reparation; that, for other offences, an acknowledgement might make amends; but that for the promulgation of our moſt private concerns, affairs of the moſt *ſecret perſonal* nature, no reparation whatſoever *could* be made. That the law *never* admits of a *general ſearch-warrant*. That in *France*, or *Spain*, even in the inquiſition itſelf, they never delegate an *infinite* power to ſearch, and that no magiſtrate is capable of delegating any ſuch power. That ſome papers, quite *innocent* in themſelves, might, by the *ſlighteſt alteration*, be converted to *criminal* action. Mr. *Wilkes*, as a *member of parliament*, demanded the more caution to be uſed, with regard to the ſeizure of his papers, as it might have been naturally ſuppoſed, that one of the *legiſlative* body might have papers of a *national* concern, not proper to be *expoſed* to every eye. When we conſider the perſons concerned in this affair, it ceaſes to be an outrage to Mr. *Wilkes perſonally*, it is an outrage to the *conſtitution* itſelf. That Mr. *Wood* had talked highly of the power of a ſecretary of ſtate; but he hoped by the verdict he would be brought to think more meanly of it. That if the warrants were once found to be legal, it would fling our liberties into a very unequal ballance. That the conſtitution of our country had been ſo fatally wounded, that it called aloud for the redreſs of a jury of *Engliſhmen.* That their reſentment againſt ſuch proceedings was to be expreſſed by large and exemplary damages; that trifling damages would put no ſtop at all to ſuch proceedings: Which would plainly appear, when they would conſider the perſons concerned in the preſent proſecution, perſons, who by their duty and office ſhould have been the *protectors* of the conſtitution, inſtead of the violaters of it.

Mr. *Eyre*, the Recorder of *London*, then ſtood up: He apologized to the bench for appearing in the preſent cauſe, conſidering the office he bore, but that he thought it was a cauſe which affected the liberty of every individual.

The Lord Chief Juſtice deſired he would make no apology. He then obſerved, that the preſent cauſe chiefly turned upon the *general queſtion*, whether a ſecretary of ſtate has a power to force perſons houſes, break open their locks, ſeize their papers, &c. upon a bare ſuſpicion of a libel by a *general warrant*, *without name* of the perſon charged A ſtrange queſtion, to be agitated in theſe days, when the conſtitution is ſo well fixed, when we have a prince upon the throne, whoſe virtues are ſo great and amiable, and whoſe regard for the ſubject is ſuch, that he muſt frown at every incroachment upon their liberty. Nothing can be more unjuſt in itſelf, than that the proof of a man's guilt ſhall be extracted from his *own* boſom. No legal authority, in the preſent caſe, to juſtify the action. No precedents, no legal determinations, not an *act of parliament* itſelf, is ſufficient to warrant any proceeding *contrary to the ſpirit of the conſtitution.*

Secretary *Williamſon*, in *Charles* the ſecond's time, for backing an illegal warrant, was ſent to the Tower by the Houſe of *Commons*. The jury, he obſerved, had no ſuch power to commit; he knew it well; but, for his part, he wiſhed they had, as he was perſuaded they would exerciſe it, in the preſent caſe, as it ought to be.

On the famous certificate in Queen *Elizabeth*'s time, how far a man might be detained by a warrant of a privy counſellor, the anſwer of the judges, even in *thoſe* days, confined it to *high treaſon only*, and the power to arreſt to be derived from the perſonal command of the king, or a privy counſellour. He then congratulated the jury, that they had now in their power the preſent cauſe, which had been by ſo much art and chicanery ſo long poſtponed. Seventy years had now elapſed, ſince the revolution, without any occaſion to enquire into this power of the ſecretary of ſtate, and he made no doubt but the jury would effectually prevent the queſtion from being *ever* revived again. He therefore recommends it to them to embrace this opportunity (leaſt another ſhould not offer, in haſte) of inſtructing thoſe great officers in their duty, and that they (the jury) would now erect a great ſea mark, by which our ſtate pilots might avoid, for the future, thoſe rocks upon which they now lay ſhipwrecked.

N. B. The Recorder ſhone extremely.

The firſt witneſs on the proſecution was *Matthew Brown*—ſays, that he is butler to Mr. *Wilkes*. That on the thirtieth of *April* laſt, about nine o'clock in the morning, *Watſon*, *Blackmore*, *Mony*, and *Man*, king's meſſengers, and *Chiſholm*, a conſtable, came to Mr. *Wilkes*'s houſe. That *Watſon* followed Mr. *Wilkes* into the houſe, and *Mony* came next; *Blackmore* and *Man* followed after. That this witneſs never heard them, or either of them, declare their buſineſs, or the purpoſe of their coming. That as ſoon as Mr. *Wilkes* was carried away, which was about noon, Mr. *Wood* and Mr. *Stanhope* came: That Mr. *Wood* aſked Mr. *Watſon*, "Have you locked "up all the rooms where Mr. *Wilkes*'s papers are?" He anſwered "Yes; I have got the key of the ſtudy." That Mr. *Wood* and Mr. *Stanhope* then went into the parlour; the meſſengers continued waiting in the paſſage. That ſoon after Mr. *Webb* knocked at the door; upon it's being opened this witneſs attempted to ſtop him, but he ruſhed in. That Mr. *Wood* ſtaid that time about half an hour; that when he went away he gave orders to the meſſengers, that no one ſhould come in or go out till he returned, but bade them lock up all the doors. That he came back again in about an hour. That in the mean time ſeveral of Mr. *Wilkes*'s friends came, *viz. Humphry Cotes*, *Gardiner*, *Phillips*, *Hopkins*, *&c.* and were denied admittance by the conſtable: That *Watſon*, the meſſenger, upon being called upon by theſe gentlemen to produce his orders for refuſing them admittance, ſaid he had only a verbal order from Mr. *Wood*. That the meſſengers, however, did at laſt permit the gentlemen to come in.

That ſoon after Lord *Temple* came; that in a ſhort time after Mr. *Wood* returned, and appeared to be very angry that the gentlemen had been admitted, "Who let theſe men in?" That the meſſengers anſwered, "They would come in." Mr. *Wood* then aſked, "Who "would come in?" Mr. *Gardiner* anſwered, "'Twas I, Sir."

That ſoon after that Mr. *Wilkes*'s friends went away; that Mr. *Wood* then called for a candle, which was brought him, and he and Mr. *Stanhope* then went up ſtairs, with *Mony* and *Blackmore*, the meſſengers, who appeared to take their orders from Mr. *Wood* and Mr. *Stanhope*. That they *rummaged all* the papers together they could find, in and about the room; that they (the meſſengers) fetched a ſack, and filled it with the papers. That *Blackmore* then went down ſtairs, and fetched a ſmith to open the locks. That *Mann*, a meſſenger, then came, and would whiſper Mr. *Wood*, who bade him ſpeak out; he then ſaid he brought orders from Lord *Hulliſax* to ſeize *all manuſcripts*. That the ſmith then came, and, by the direction of *Blackmore*, the meſſenger, opened four locks of the lower drawers of a bureau; that they took out *all* the papers in thoſe drawers, and a pocket-book of Mr. *Wilkes*'s, and put them *all* into the ſack together, and then ſealed up the ſack. That this witneſs was preſent during all this time; that the meſſengers were obedient, and paid an entire regard to the directions of Mr. *Wood* and Mr. *Stanhope*. That when Mr. *Wood* went away it was near two o'clock in the afternoon; that Mr. *Wood*, upon the whole, might be near two hours and an half in Mr. *Wilkes*'s houſe. That no kind of inventory was made of the papers which were put into the ſack. That Mr. *Stanhope* appeared all along to be favourable, and frequently bade the meſſengers be *cautious* and *careful*.

Upon his being croſs-examined, he ſaid,

That Mr. *Wilkes* was carried away about noon.

That Mr. *Wilkes* went out in the morning about ſix, and returned home about nine o'clock.

That Mr. *Hopkins* had been there that morning before.

That Mr. *Wood* did abſolutely and poſitively (this witneſs avers it) order, upon his going out, that all the doors ſhould be locked up, particularly the ſtreet door: That Mr. *Wood* told the meſſengers they knew their orders, and bade them execute them. That he remembers Mr. *Stanhope* bid them be careful in rummaging, but don't recollect Mr. *Wood* ſaid ſo. That *Chiſholm*, the conſtable, held the ſack, whilſt the meſſengers filled it with papers.

That Mr. *Wood* was not there when the locks were opened: He now ſays, that Mr. *Wood* had before declared that the locks muſt be opened.

That Mr. *Stanhope* ſaid, to be ſure, the locks muſt be opened. That Mr. *Wood*, he now ſays, was at one time above an hour in Mr. *Wilkes*'s ſtudy.

That Mr. *Stanhope* was there with Mr. *Wood* at the time the papers were carried away.

That Mr. *Webb* was gone away ſome time before.

Richard Schofield ſays, that he is a livery ſervant to Mr. *Wilkes*: That he let Mr. *Wood* in at the door on the 30th of *April*, about eleven o'clock in the morning, as he thinks, to the beſt of his rememmembrance; that Mr. *Wood* ſtaid the firſt time about a quarter of an hour. He confirms in general the laſt witneſs.

That *Wood* went away, and returned in about an hour.

That the meſſenger, upon being aſked by Mr. *Gardiner* for his orders, ſaid he had only verbal ones, from Mr. *Wood*.

That he can give *no* account of what paſſed up ſtairs, as he remained all that time in the paſſage below.

He confirms the laſt witneſs on that circumſtance of the meſſenger, *Mann*'s, coming from Lord *Hallifax*, with freſh orders.

That a poſt-letter came, in the mean time, directed to Mr. *Wilkes*, which the meſſenger, *Watſon*, received, and would not deliver till Mr. *Wood* returned, who immediately delivered it, *unopened*, into this witneſs's hands.

That Mr. *Wood*, when he went away, ordered the doors to be kept faſt locked, particularly the ſtreet door.

That *Blackmore* came down ſtairs, and aſked this witneſs where Mr. *Wilkes*'s ſmith lived, and he anſwered him he believed in *Cheapſide*.

Upon his being croſs-examined, he ſaid,

That Mr. *Wood* came about a quarter of an hour after Mr. *Wilkes* was carried away to Lord *Hallifax*.

That Mr. *Wood*, Mr. *Stanhope*, the four meſſengers, with the conſtable, together with another gentleman, whom he did not know, were the perſons who came into the houſe.

Humphry Cotes ſays, that he was at Mr. *Wilkes*'s the 30th of *April* laſt, in the morning, about eleven o'clock, being ſent for by Mr. *Wilkes*.

That Mr. *Wood* came in between twelve and one: That he (this witneſs) had been down to the court of Common Pleas, to apply for a *habeas corpus*, and, upon his return to Mr. *Wilkes*'s houſe, was told that Mr. *Wilkes* was not at home, and that he, *Cotes*, muſt not come in; this was between twelve and one o'clock. He demanded the reaſon why he muſt not come in, and by whoſe authority the door was locked. The man at the door anſwered, by the ſecretary of ſtate's.

The ſolicitor-general diſputed this evidence, as Mr. *Cotes* did not declare the man's name.

But *Cotes* then ſaid, that the door-keeper called *Watſon*, the meſſenger, to him; who ſaid he had the ſecretary's verbal order only, but not a written one.

That this witneſs did then inſiſt upon being admitted, and did accordingly enter the houſe.

That Mr. *Wood* preſently after came in, and ſaid, with anger, "What do theſe men do here?"

That this witneſs then ſaid, "What buſineſs have you here, Sir?" Mr. *Wood* anſwered, that he was the ſecretary of ſtate's ſecretary.

That this witneſs then ſaid, he had nothing to do with the ſecretary of ſtate, nor his ſecretary neither; that his name was *Humphry Cotes*, and was to be ſpoken with at any time.

That he (this witneſs) ſtaid at Mr. *Wilkes*'s houſe till paſt two o'clock.

That he was deſired by Mr. *Wood* to be preſent when Mr. *Wilkes*'s papers were ſealed up, which he refuſed to do.

The ſolicitor-general did not croſs-examine him.

Richard Hopkins, Eſq; ſays, that he went to Mr. *Wilkes* on the 30th of *April* laſt, at half an hour paſt nine o'clock in the morning, and ſtaid two hours; found then no kind of obſtruction.

That Mr. *Wood* was not there at this time, as this witneſs verily believes; but that, when he returned, Mr. *Wood* had been there.

Confirms the laſt witneſs's account, of the obſtructions to his entring the houſe, at this his laſt coming. That he was deſired to be preſent at the ſealing up Mr. *Wilkes*'s papers, which he declined doing.

Arthur Beardmore ſays, that he was in *Weſtminſter-hall* on the 30th of *April* laſt, and, hearing of Mr. *Wilkes*'s arreſt, he went directly to his houſe, and, with ſome difficulty, gained admittance. That when he gained admittance, and came into the parlour, Mr. *Wood* was there, altercating with the laſt witneſs, Mr. *Hopkins*.

That Mr. *Gardiner* and Mr. *Cotes* were then there.

That Lord *Temple* was likewiſe there.

That he (this witneſs) obſerving much confuſion, demanded of Mr. *Wood* to ſhew his authority, and that much wrangling then enſued. That Mr. *Wood* and Mr. *Webb* were both there at this time. That Mr. *Wood* intreated the company to believe, that the ſecretaries had acted entirely purſuant to the advice and direction of the attorney and ſolicitor generals; to which this witneſs anſwered, that he very much doubted it.

That this witneſs, coming into the parlour again through the paſſage, ſaw Mr. *Webb* ſtanding at the foot of the ſtairs, with ſome keys in his hand, which this witneſs did preſume, and verily did believe, to be ſome of Mr. *Wilkes*'s keys to his private eſcrutoires and drawers.

That Mr. *Wood* did deſire him (this witneſs) to be preſent at the ſealing up Mr. *Wilkes*'s papers, which he utterly refuſed to do.

The counſel for the proſecution declined examining Mr. *Gardiner* and Mr. *Phillips*, (who had both been preſent) on account of their being employed in the cauſe; and therefore reſt here.

The ſolicitor-general then ſtood up to make the defence, which he divided into two parts; and firſt, he maintained the plea of *Not guilty*; but if the jury ſhould be of opinion that would not ſtand good, and that the evidence he ſhould bring would not be capable of ſetting aſide the evidence already produced in court on the other ſide; he then, ſecondly, relied on the *ſpecial juſtification*. He was at a loſs, he ſaid, to underſtand what Mr *Wilkes* meant by bringing an action againſt Mr. *Wood*, as he was neither the iſſuer of the warrant, nor the executioner of it. If the conſtitution had been in ſuch an egregious manner attacked, why not bring the ſecretaries of ſtate, themſelves, into court? Why ſhould Mr. *Wilkes* commence ſeparate actions againſt each perſon? Is Mr. *Wilkes*, at any event, entitled to tenfold damages? This was the firſt time he ever knew a *private* action repreſented as the cauſe of all the good people of *England*. If the *conſtitution* has, in any inſtance, been violated, the *crown* muſt be the proſecutor, as it is in all *criminal* caſes. The conſtitution does not conſiſt in any one particular part of the law; the whole law is the conſtitution of the country, and a breach in one part of the law is as much a violation of the conſtitution as of another. Though ſo much has been ſaid on the other ſide, with regard to the injury that might reſult from the promulgation of ſecrets, no proof had been brought of any thing being promulgated that was not proper to be ſo. The arguments which had been uſed againſt ſeizing of papers, to procure proof, were *felo de ſe*, unleſs the major was denied to include the minor. He then went upon the argument touching the warrant, and obſerved that theſe warrants had been iſſued as far back as the courts of juſtice could lead them. That the late act of parliament of *George* the Second for taking up vagrants was a *general ſearch-warrant*, and he never knew it was ever eſteemed an infringement of our conſtitution. That theſe warrants had exiſted *before*, *at*, and *ſince* the revolution, and had been till this caſe unimpeached; that if ſo contradictory to the conſtitution of this country, they could never have remained to this time.

He then made a general obſervation to the jury, that it was their duty to hear the cauſe coolly and diſpaſſionately, without any bias to one ſide or the other. He then went on to make remarks on the evidence which had been given by the plaintiff; remarked that the queſtion of liberty had nothing to do with the preſent cauſe, which only reſpected the ſeizure of papers. That the meſſengers went bunglingly about their buſineſs; Mr. *Wood* was only ſent to ſee they did their duty.

He then went on to make remarks on the *North Briton*, No. 45. That it was a libel on the three branches of the legiſlative body, king, lords, and commons; that it was a libel of ſuch a nature, that when it was before the two houſes of parliament not one ſingle perſon, in either houſe, ever uttered one ſingle word in defence of it. That the whole of the *North Britons* were of ſuch a nature, that it aſtoniſhed moſt conſiderate perſons how they ſhould have paſſed ſo long unnoticed; that it had attacked private perſons, perſons in public ſtations, with their names written at full length; which had already produced bloodſhed, in an inſtance which they all well knew: And what farther fatal conſequences might reſult from thoſe publications, who would be anſwerable! If Mr. *Wilkes* ſhould be proved to be the author of theſe papers, and of that libel of libels, No. 45. (an equal to which he defied this or any other age to produce) if he ſhould be proved to be the author of that paper, which he was confident he ſhould be able to prove, to the full ſatisfaction of the court and jury; in that caſe, ſo far from thinking him worthy of *exemplary* damages, he was certain they would view him in his true and native colours, as a moſt vile and wicked incendiary, and a ſower of diſſention amongſt his majeſty's ſubjects. He then obſerved, that the *freedom* of this country conſiſts, that there is *no man ſo high*, that he is *out of the reach of the law*, nor any *man ſo low, that he is beneath the protection of it.*

That the warrant was legal in itſelf: That the authority of a ſecretary of ſtate was ſufficiently eſtabliſhed. That damages ſhould always be reckoned according to the *injury* received: A jury that ever acted on any other principles certainly forſwore themſelves.

Lord *Hallifax* then came into court, and being ſworn, ſaid, that he did receive information concerning No. 45.

That he did iſſue warrants in conſequence of ſuch information. That he did deſire Mr. *Weſton*, his ſecretary, to go to Mr. *Wilkes*'s, and ſee that the meſſengers did their duty; that Mr. *Weſton* declined it, beſeeching his Lordſhip to excuſe him, on account of his weak nerves, and ill ſtate of health; that he then did deſire Mr. *Wood* to go, who accordingly went. That he had reaſon to believe that Mr. *Wilkes* was the author of No. 45.

That he had information previous to the apprehending Mr. *Wilkes*, and his Lordſhip believes, to the beſt of his remembrance, it was on the very day the warrant was put in execution.

That this information tended to prove Mr. *Wilkes* the author of No. 45; but he cannot pretend to charge his memory with the entire contents of the information.

That orders were given by his Lordſhip to the meſſengers, but he declares that he cannot, at this time, pretend to recollect either their names or their perſons. That theſe orders were given by his Lordſhip previous to the apprehenſion of Mr. *Wilkes*.

Upon the Lord Chief Juſtice expreſſing a deſire to be informed by his Lordſhip concerning the nature of the information ſaid to be received at his office, and about which his Lordſhip appeared rather ſhy, and cautious of entering upon, the ſolicitor-general then produced an affidavit of *Walter Balff*, a printer in the *Old Bailey*, which was read, in order to prove Mr. *Wilkes* the author of No. 45.

[I cannot recollect the whole of this affidavit, but it had in general a tendency to prove *Wilkes* the author and this *Balff* the printer of No. 45.]

Upon Lord *Hallifax*'s being croſs-examined, he ſaid, that Mr. *Weſton* is his own ſecretary, and that Mr. *Wood* was Lord *Egremont*'s ſecretary.

His Lordſhip was aſked, whether he ſhould think himſelf then authorized to command the ſecretary of Lord *Egremont* to do any thing. After ſome heſitation, his Lordſhip anſwered, not without conſulting Lord *Egremont*.

Said, that the offices are carried on in ſeparate departments, but form only one complete ſecretaries office. He owns, however, that each ſecretary has the entire chooſing and appointing his own officers.

That the warrant for the apprehenſion of Mr. *Wilkes* was iſſued (as he calls it, which, being explained, ſignifies made out) on the 26th of *April* laſt, and the information he now fixes to have been received on the 29th of *April*, and the arreſting *Wilkes*'s perſon on the 30th day of *April*.

N. B. His Lordſhip here fairly acknowledges that he iſſued the warrant three whole days before he received any information at all; and that during theſe three days the warrant lay dormant, whilſt they were upon the hunt for intelligence.

The king's ſpeech at the cloſe of the laſt ſeſſions of parliament was then read.

The *North Briton*, No. 45, was afterwards read.

Some ſtrictures of the ſolicitor-general then enſued, upon the heinouſneſs of the author's crime.

Thomas Cadell ſays, that he is apprentice to *Andrew Millar*, a bookſeller in the *Strand*; that he is nearly out of his apprenticeſhip. That Mr. *Wilkes* called there in the ſummer of 1762, and left word with him, (this witneſs) that his maſter ſhould advertiſe a new paper, ſhortly to come out, entitled the *North Briton*, and to be publiſhed by him *(Millar)*: That his maſter did, in conſequence, advertiſe it, and was paid by Mr. *Wilkes* the ſum of one pound eight ſhillings, for advertiſements.

[*N. B.* The receipt was produced in court.]

That his maſter did afterwards, upon conſidering the affair, decline publiſhing the *North Briton*; ſaying he would publiſh no political matters.

Serjeant *Glynn* then objected to their going into the evidence, to prove Mr. *Wilkes* the author of other papers, which had no reſpect to the paper in queſtion; but

The Lord Chief Juſtice allowed it to be a *good corroborating chain*: But obſerved, if they failed in the *laſt* link, the *whole* would *fall* to the ground.

William Johnſton ſays, that he is a bookſeller in *Ludgate-ſtreet*. That Mr. *Wilkes* applied to him to publiſh the *North Briton*, previous to it's appearing: That Mr. *Wilkes* did explain to him the general deſign; that he ſaid he muſt have a publiſher who would not ſtand in fear of the cenſures of juſtice.

That he never met Mr. *Wilkes* any where on this account; but that Mr. *Wilkes* always came to him.

That he, (this witneſs) upon conſideration of the matter, declined publiſhing the *North Briton*.

That Mr. *Wilkes* then deſired him to recommend a publiſher: That he recommended Mr. *Kearſly* to him.

That he (this witneſs) had a correſpondence with Mr. *Wilkes*, concerning the *North Britons*, and reviſing them for the preſs; but that, after three or four numbers of the paper were publiſhed, he (this witneſs) did, upon conſidering the affair, decline that alſo.

Jonathan Scott ſays, that he knows Mr. *Wilkes*'s hand-writing, and proves a number of letters ſhewn him to be Mr. *Wilkes*'s hand-writing, *viz.*

No. 1,	dated	*Weſtminſter*,	26 *July* 1762.
2,		ditto,	29.
3,		ditto,	8 *Auguſt*.
4,		*Ayleſbury*,	15.
5,		ditto,	25.
6,		*Great George-ſtreet*,	7 *October*.
7,		*Wincheſter*,	14.
8,		ditto,	31.
9,		*Great George-ſtreet*,	*Friday morning*.
10,		ditto,	27 *November*.
11,		ditto,	12 *December*.
12,		ditto,	17.

All theſe were read; they are to *Kearſly*, and relate to *North Britons*, then ſent to be publiſhed.

[*N. B.* Between twenty and thirty letters were produced, but theſe only were read.]

Walter Balff ſays, in the firſt place, that he is under a recognizance, and therefore prays he may be excuſed from anſwering any queſtion which may tend to *affect* or *injure himſelf*.

A debate enſued for near an hour, whether he may or may not be allowed the privilege.

The Sollicitor-General very ſtrenuouſly aſſerts, that in the preſent caſe he may *not* be allowed it.

Serjeant *Glynn*, and the Recorder, reply to him.

The Lord Chief Juſtice gives it as his opinion, that the man is *not bound* to anſwer to any matter which may tend to *accuſe* himſelf.*

Balff, then ſays, that he is a printer in the *Old Baily*, and that he knows Mr. *Wilkes*.

Queſtion—Did you receive this letter? One being ſhewn to him. Anſwer—Yes.

A letter of the 22d of *April* was then read of Mr. *Wilkes* to *Walter Balff*, which, from the purport of it, has a ſtrong tendency to prove *Wilkes* the author of No. 45.

This letter of *Wilkes* refers to an encloſed paper (which paper does not appear) which he directs *Balff* to bring in, in the form of a letter, betwixt the concluſion of the next *North Briton*, and his propoſals.

This letter likewiſe directs *Balff* to print the *North Briton* ſpoken of, in the compaſs of *two* ſheets.

Charles Shaw ſays, that he is an apprentice to *Water Balff* the laſt witneſs. That the *North Briton*, No. 45. was printed at his maſter's houſe. That he knows Mr. *Wilkes*, and has ſeen him often at his maſter's houſe, but that he does not know the buſineſs upon which he came there.

George Kearſley ſworn, but not ſuffered to be examined, being under a proſecution at this time.

Michael Curry ſays, that he is a journeyman printer, that he was employed by Mr. *Wilkes* to work at the preſs in *Great George-ſtreet*; that Mr. *Wilkes* gave them the whole ſet of the *North Britons* to be printed, and called them at that time *his North Britons*.

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* Nemo tenetur ſeipſum accuſare.

The counſel for the proſecution objected to this laſt being a proper evidence at all to the queſtions; as Mr. *Wilkes* or any other perſon's *republiſhing* a work, againſt which there was no judicial determination, could never affect them, as the *original* author and publiſher of it.

They then went into the *legality* of the warrant, and many *precedents* of the ſame kinds of warrants were produced in court, to prove ſuch warrants the conſtant uninterrupted courſe of the ſecretaries office from the revolution.

The warrants from Lord *Hallifax*, for apprehending the authors printers and publiſhers of the *North Briton* No. 45. were likewiſe read.

Loveill Stanhope, Eſq; ſays that he came to Mr. *Wilkes*'s houſe immediately after he was carried away to Lord *Hallifax*'s; that he went with Mr. *Wood*, and ſtayed there half an hour; that he was there but once, and ſtayed till the papers were ſealed up; that he never went out of the ſtudy; that Mr. *Wood* was in the ſtudy but part of the time, and did nothing at all but obſerve what paſt; that he (Mr. *Wood*,) gave no orders to break locks by any kind of means, nor gave the meſſengers any orders or directions at all, but only bade them do their duty, and uſe civility!

That Mr. *Wood* was not in the room when the ſmith was ſent for, nor gave any orders for that purpoſe, as Mr. *Stanhope* obſerved; that Mr. *Wood* was not preſent when the locks were opened.

But that it was *Blackmore*, the meſſenger, who broke open the locks, (in this circumſtance Mr. *Stanhope* exactly confirms *Matthew Brown*'s evidence.)

That Mr. *Wood* went to Mr. *Wilkes*, merely at the inſtance of Lord *Halifax*, in order to inforce a due and proper obedience to and execution of the warrant, and to prevent the meſſengers from committing any blunders.

That a debate ariſing, whether a table with a locked drawer ſhould be removed entire or be opened, Mr. *Mann* was ſent to Lord *Hallifax* for directions, and brought word that the drawers muſt be opened.

Upon his being croſs examined, ſaid that the meſſenger were to take *manuſcript papers* only, and not meddle with *improper* matters, ſuch as *printed* books, *papers*, &c. That he did think it incumbent upon him (this witneſs) to ſee that all the *proper* papers ſhould be removed.

Robert Chiſholm ſays that he was the conſtable called upon to attend the meſſengers to Mr. *Wilkes*; that it was on the 30th of *April* laſt, at ſix o'clock in the morning, that he was called upon; that Mr. *Wood* came immediately after Mr. *Wilkes* was carried away; that he (this witneſs) heard Mr. *Wood* give no kind of orders at all; in ſhort, that his opinion is, Mr. *Wood* only came to take care that the meſſengers did nothing that was wrong or improper.

Mr. *Dunning* aſked this witneſs, whether he then imagined, that Mr. *Wood* appeared there merely on behalf of Mr. *Wilkes*, as his friend—he anſwered not ſo neither.

This witneſs ſhuffled and prevaricated very much, and contradicted his own evidence more than once.

Philip Carteret Webb, Eſq; ſays that Mr. *Wood* was ſent by the ſecretaries, merely to ſee that the meſſengers executed their warrants in due form and order; that he (this witneſs) was only once at Mr. *Wilkes*'s, and then not more than half an hour; that he went becauſe the ſecretary of ſtate was uneaſy, and anxious to know what was doing at Mr. *Wilkes*'s; that he (this witneſs) was never up ſtairs at Mr. *Wilkes*'s; that he had a converſation with Lord *Temple* in the parlour. That he denies he had ever any keys of Mr. *Wilkes* in his hands; that he verily believes he had *no* keys at all in his hands; but that if he had any, they were his *own* and not Mr. *Wilkes*'s.

Upon being croſs examined by Mr. *Dunning*, *Philip Carteret Webb* then ſaid, that upon recollection he was abſolutely certain, that he had *no* keys at that time in his hands.

That Mr. *Weſton* was deſired by Lord *Hallifax* to go, but that he excuſed himſelf on account of his weak nerves, and ill ſtate of health, and that upon his (Mr. *Weſton*) declining it Mr. *Wood* was deſired by my Lord to go, which he accordingly did.

Richard Watſon ſays that he is a king's meſſenger, that he was at Mr. *Wilkes*'s on the 30th of *April* laſt, that Mr. *Wood* was there and did nothing at all as this witneſs obſerved, but only gave them directions how to act.

The Solicitor-General obſerved, when *Balff* and *Kearſley*'s evidence were ſet aſide, that he placed little dependance on their evidence, as to the proof of Mr. *Wilkes* being the author of No. 45, and indeed he ſaid it was not very material, for that the letter from Mr. *Wilkes* to *Balff* the printer which had been read, ſee page 26, and which he then held in his hand, was concluſive evidence againſt him. *Norton* expatiated long upon the circumſtance of this letter: He obſerved that it was a lucky circumſtance for them that No. 45 was the only number of the *North Briton* which was printed on two ſheets of paper, that it was the only number that had a letter at the end of it, with the propoſals following. He enlarged very fully on all theſe correſponding circumſtances.

Lord Chief Juſtice *Pratt* aſked for the letter which was encloſed, that he might compare it with the letter at the end of the *North Briton*, No. 45.

But the Solicitor-General anſwered, he had it not.

Serjeant *Glynn* in his *reply* obſerved, that the manner of defence that had been ſet up would neceſſarily make his reply longer than it otherwiſe would have been. What he had to remark he ſhould divide under two heads, 1ſt, as to the defence which had been ſet up of *not guilty*; and 2dly, make obſervations on the *ſpecial juſtification* that had been pleaded.

The evidence proved, uncontroverted, that Mr. *Wood* was the prime actor in the whole affair. He then obſerved that the three witneſſes on the ſide of the defendant gave different evidences of the buſineſs Mr. *Wood* came about: Mr. *Philip Carteret Webb*'s account was quite inconſiſtent: Was it poſſible to ſuppoſe that a man of Mr. *Wood*'s character and known abilities ſhould be ſent only with a meſſage that any menial ſervant could have delivered as well; and that he ſhould have nothing elſe to do with the affair. He then obſerved that all the witneſſes called to oppoſe the evidence of their ſide were *all* parties, and againſt whom proſecutions of a like nature were at preſent depending. He then went upon the point of *juſtification*, and obſerved, that as to Mr. *Wilkes* being the author of No. 45, they had totally failed in any kind of proof whatſoever; or if they had produced the appearance of a proof, it was quite aſide to the preſent queſtion, and to which he ſhould not at any event have made any reply, as there was at preſent depending a proſecution, as to that particular point, in his defence of which he made no doubt he ſhould be able fully to prove, that Mr. *Wilkes* was not the author.—That Mr. *Wilkes* could not be ſuppoſed or even ſuſpected of any deſign againſt the preſent eſtabliſhment; that he was educated in and had always adopted whig principles; that he was known to be attached to and to have the higheſt opinion of the preſent prince on the throne, which he had often and upon many occaſions declared; and his conduct had always been anſwerable to theſe declarations. When crimes have been exaggerated, and ſo much declamation made uſe of as there has been on the preſent occaſion, one would naturally have expected that ſome proof would have followed; but that in reality could never have been the

caſe,

caſe, as the ſole deſign was to blacken Mr. *Wilkes*'s character, without any foundation in fact. He then obſerved that various hands were commonly employed in moſt periodical works; that Mr. *Wilkes* was not denied to be the author of ſome of the *North Britons*; but that it was not likely he was the author of No. 45, and that indeed the republication of the work in volumes, in which was No. 45, ſo far from being a preſumption againſt him, certainly affords the ſtrongeſt reaſon to think he was not the author; for if he had been ſo, it is not likely he would have been concerned in a publication, whilſt a criminal proceſs was depending. He then obſerved as to the warrant, that it was deſtitute of thoſe things neceſſary to make it legal: That a *previous information* was *always neceſſary*. That the defendants had nothing to entitle them to a verdict; that the evidence they had ſet up was perfectly declamatory and unfair: Poſſibly Mr. Solicitor-General's office, might demand from him what he had ſaid; but that he was well ſatisfied, from that gentleman's known good character and great abilities, that he would have refuſed to plead in a cauſe of a ſimilar nature, which he was not forced to do *ex officio*. He was ſatisfied the jury would not view Mr. *Wilkes* as not entitled to a verdict, becauſe loaded with calumny: That the caſe was a wound given to the conſtitution, and demanded damages accordingly: That Mr. *Wilkes*'s papers had undergone the inſpection of very improper perſons to examine his private concerns, and called for an increaſe of damages on that ſcore. The evidence brought of *precedents* of theſe kind of warrants only ſhew how *eaſy* things may *creep* into our *conſtitution*, *ſubverſive* of its very *foundation*. He then cloſed with telling the jury he made no doubt, but they would find a verdict for the plaintiff, with large and exemplary damages.

The *Lord Chief Juſtice* then ſummoned up the evidence of the whole, and obſerved it was an action of treſpaſs, to which the defendant had pleaded firſt not guilty, and then a ſpecial juſtification. He then went through the particulars relating to the juſtification, the king's ſpeech, the libel No. 45.

Information given, that ſuch a libel was publiſhed,

Lord *Hallifax* granting a warrant; meſſengers entering Mr. *Wilkes* houſe; Mr. *Wood* directed to go thither only with a meſſage, and remaining altogether inactive in the affair.

If the jury ſhould be of opinion, that every ſtep was *properly* taken as repreſented in the juſtification, and ſhould eſteem it fully proved, they muſt find a verdict for the defendant. But if on the other hand they ſhould view Mr. *Wood* as a party in the affair, they muſt find a verdict for the plaintiff, with damages. This was a general direction his Lordſhip gave the jury, and he then went into the *particulars* of the evidence. The chief part of the *juſtification*, he obſerved, conſiſted in proving Mr. *Wilkes* the *author*, and the evidence given, together with the letters to *Kearſley* plainly ſhew, that Mr. *Wilkes* was *generally* ſo. Then as to No. 45, the evidence was of two ſorts, firſt a letter to fix it upon him, and the other general: As to the proof of the republication of the *North Britons* given by *Currie*, ſuppoſing it of itſelf ſufficient, of which there was a doubt, it did not extend to the preſent caſe, to juſtify a *warrant* iſſued ſeveral weeks *previous* to that period. As to the letter, the gentleman muſt take that out with them, together with the *North Briton*, No. 45, and allow all the weight to the circumſtance they think it will admit of.

If upon the whole they ſhould eſteem Mr. *Wilkes* to be the *author* and *publiſher*, the juſtification would be fully proved. But that, to do this, it was eſſentially neceſſary to have the encloſed paper in the letter to *Baiff*, as, without that, all the reſt was but *inference*, and not the proof *poſitive* which the law required. As to Mr. *Wood*, he was deſcribed on one ſide as very active in the affair, and on the other ſide as quite inoffenſive. *Aiders* and *abetters* are always eſteemed *parties*; but if a perſon preſent remains only a ſpectator, he cannot be affected. The evidence on the one ſide had been poſitive, and on the other ſide only negative. Mr. *Wood* might have ſaid and done as repreſented on the one ſide, when the evidences on the other ſide were not preſent: If upon the *whole* they ſhould be of opinion, that Mr. *Wood* was active in the affair, they muſt find a verdict for the *plaintiff* with damages. His Lordſhip then went upon the warrant, which he declared was a point of the *greateſt conſequence* he had ever met with in his whole practice. The defendants claimed a right, under *precedents*, to force perſons houſes, break open eſcrutores, ſeize their papers, *&c.* upon a *general* warrant, where no inventory is made of the things thus taken away, and where *no offenders names are ſpecified in the warrant*, and therefore a *diſcretionary* power given to *meſſengers* to ſearch wherever their *ſuſpicions* may chance to fall. If ſuch a power is *truly* inveſted in a ſecretary of ſtate, and he can delegate this power, it certainly may affect the perſon and property of every man in this kingdom, and is *totally ſubverſive* of the *liberty* of the *ſubject*.

And as for the *precedents*, will that be eſteemed law in a ſecretary of ſtate which is *not* law in *any* other magiſtrate of this kingdom? If they ſhould be found to be *legal*, they are certainly of the moſt dangerous conſequences; if *not legal*, muſt aggravate damages. Notwithſtanding what Mr. Solicitor-General has ſaid, I have formerly delivered it as my opinion on another occaſion, and I ſtill continue of the ſame mind, that a jury have it in their power to give damages for *more* than the *injury* received. *Damages* are deſigned not only as a *ſatisfaction* to the *injured* perſon, but likewiſe

wiſe as a *puniſhment* to the *guilty*, to *deter* from any ſuch proceeding for the future, and as a proof of the *deteſtation* of the *jury* to the *action* itſelf.†

As to the proof of what papers were taken away, the plaintiff could have no account of them; and thoſe who were able to have given an account (which might have been an extenuation of their guilt) have produced none. It lays upon the jury to allow what weight they think proper to that part of the evidence. It is my opinion the *office precedents*, which had been produced ſince the revolution, are *no* juſtification of a practice in *itſelf illegal*, and *contrary* to the *fundamental principles* of the *conſtitution*; though its having been the *conſtant practice* of the office, might fairly be pleaded in *mitigation* of *damages*.*

He then told the jury they had a very material affair to determine upon, and recommended it to them to be particularly cautious in bringing in their verdict. Obſerved, that if the jury found Mr. *Wilkes* the author or publiſher of No. 45, it would be filed, and ſtand upon record in the court of Common Pleas, and of courſe be produced as proof, upon the criminal cauſe depending, in barr of any future more ample diſcuſſion of that matter on both ſides; that on the other ſide they ſhould be equally careful to *do juſtice*, according to the evidence; he therefore left it to their conſideration.

The jury, after withdrawing for near half an hour, returned, and found a *general verdict* upon both iſſues for the *plaintiff*, with a *thouſand pounds* damages.

After the verdict was *recorded*, the Sollicitor-General offered to prefer a *bill* of *exceptions*, which the Lord Chief Juſtice refuſed to accept, ſaying it was out of time.

The court ſat at nine o'clock in the morning, and the verdict was brought in at twenty minutes paſt eleven o'clock at night.

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† Vita reipublieæ pax, et animus libertas, et libertatis, firmiſſimum propugnaculum ſua cuique domus legibus munita.

* Ut pœna ad paucos, metus ad omnes pertingat.
Indicandum eſt legibus non exemplis.

BRITISH MUSEUM

Eaſter Term,

12 Geo. 3. 1772. K. B.

Somerſet *againſt* Stewart.

MAY 14, 1772.

ON return to an *habeas corpus*, requiring Captain *Knowles* to ſhew cauſe for the ſeizure and detainure of the complainant *Somerſet*, a negro—The caſe appeared to be this——

That the negro had been a ſlave to Mr. *Stewart*, in *Virginia*, had been purchaſed from the *African* coaſt, in the courſe of the ſlave-trade, as tolerated in the plantations; that he had been brought over to *England* by his maſter, who intending to return, by force ſent him on board of Captain *Knowles*'s veſſel, lying in the river; and was there, by the order of his maſter, in the cuſtody of Captain *Knowles*, detained againſt his conſent; until returned in obedience to the writ. And under this order, and the facts ſtated, Captain *Knowles* relied in his juſtification.

Upon the ſecond argument, (Serjeant *Glynn* was in the firſt, and, I think, Mr. *Manſfield*) the pleading on behalf of the negro was opened by Mr. *Hargrave*. I need not ſay that it will be found at large, and I preſume has been read by moſt of the profeſſion, he having obliged the public with it himſelf: But I hope this ſummary note, which I took of it at the time, will not be thought impertinent; as it is not eaſy for a cauſe in which that gentleman has appeared, not to be materially injured by a total omiſſion of his ſhare in it.

Mr. *Hargrave*.

The importance of the queſtion will I hope juſtify to your lordſhips the ſolicitude with which I riſe to defend it; and however unequal I feel myſelf, will command attention. I truſt, indeed, this is a cauſe ſufficient to ſupport my own unworthineſs by it's ſingle intrinſic merit. I ſhall endeavour to ſtate the grounds from which Mr. *Stewart*'s ſuppoſed right ariſes; and then offer, as appears to me, ſufficient confutation to his claim over the negro, as property, after having him brought over to *England*; (an abſolute and unlimited property, or as right accruing from contract;) Mr. *Stewart* inſiſts on the former. The queſtion on that is not whether ſlavery is lawful in the colonies, (where a concurrence of unhappy circumſtances has cauſed it to be eſtabliſhed as neceſſary;) but whether in *England?* Not whether it ever has exiſted in *England*; but whether it be not now aboliſhed? Various definitions have been given of ſlavery: One of the moſt conſiderable is the following; a ſervice for life, for bare neceſſaries. Harſh and terrible to human nature as even ſuch a condition is, ſlavery is very inſufficiently defined by theſe circumſtances—it includes not the power of the maſter over the ſlave's perſon, property, and limbs, life only excepted; it includes not the right over all acquirements of the ſlave's labour; nor includes the alienation of the unhappy object from his original maſter, to whatever abſolute lord, intereſt, caprice or malice, may chuſe to transfer him; it includes not the deſcendible property from father to ſon, and in like manner continually of the ſlave and all his deſcendants. Let us reflect on the conſequences of ſervitude in a light ſtill more important. The corruption of manners in the maſter, from the entire ſubjection of the ſlaves he poſſeſſes to his ſole will; from whence ſpring forth luxury, pride, cruelty, with the infinite enormities appertaining to their train; the danger to the maſter, from the revenge of his much injured and unredreſſed dependant; debaſement of the mind of the ſlave, for want of means and motives of improvement; and peril to the conſtitution under which the ſlave cannot but ſuffer, and which he will naturally endeavour to ſubvert, as the only means of retrieving comfort and ſecurity to himſelf.—The humanity of modern times has much mitigated this extreme rigour of ſlavery; ſhall an attempt to introduce perpetual ſervitude here to this iſland hope for countenance? Will not all the other miſchief of mere utter ſervitude revive, if once the idea of abſolute property, under the immediate ſanction of the laws of this country, extend itſelf to thoſe who have been brought over to a ſoil whoſe air is deemed too pure for ſlaves to breathe in? Not that they cannot actually breathe in it; but the laws, the genius and ſpirit of the conſtitution, forbid the approach of ſlavery; will not ſuffer it's exiſtence here. This point, I conceive, needs no further enlargement: I mean, the proof that our mild and juſt conſtitution is ill adapted to the reception of arbitrary maxims and practices. But it has been ſaid by great authorities, tho' ſlavery in it's full extent be incompatible with the natural rights of mankind, and the principles of good government, yet a moderate ſervitude may be tolerated; nay, ſometimes muſt be maintained. Captivity in war is the principal ground of ſlavery: Contract another. *Grotius de J. B. & P.*

and *Puſendorf*, *b.* 6. *c.* 3. § 5. approves the making ſlaves of captives in war. The author of the Spirit of the Laws denies, except for ſelf-preſervation, and then only a temporary ſlavery. Dr. *Rutherforth*, in his Principles of Natural Law, and *Locke*, abſolutely againſt it. As to contract; want of ſufficient conſideration juſtly gives full exception to the conſidering of it as contract. If it cannot be ſupported againſt parents, certainly not againſt children. Slavery impoſed for the performance of public works for civil crimes, is much more defenſible, and reſts on quite different foundations. Domeſtic ſlavery, the object of the preſent conſideration, is now ſubmitted to obſervation in the enſuing account, its firſt commencement, progreſs, and gradual decreaſe: It took origin very early among the barbarous nations, continued in the ſtate of the *Jews*, *Greeks*, *Romans*, and *Germans*; was propagated by the laſt over the numerous and extenſive countries they ſubdued. Incompatible with the mild and humane precepts of chriſtianity, it began to be aboliſhed in *Spain*, as the inhabitants grew enlightened and civilized, in the 8th century; it's decay extended over *Europe* in the 14th; was pretty well perfected in the beginning of the 16th century. Soon after that period, the diſcovery of *America* revived thoſe tyrannic doctrines of ſervitude, with their wretched conſequences. There is now at laſt an attempt, and the firſt yet known, to introduce it into *England*; long and uninterrupted uſage from the origin of the common law, ſtands to oppoſe its revival. All kinds of domeſtic ſlavery were prohibited, except villenage. The villain was bound indeed to perpetual ſervice; liable to the arbitrary diſpoſal of his lord. There were two ſorts; villain regardant, and in groſs: The former as belonging to a manor, to the lord of which his anceſtors had done villain ſervice; in groſs, when a villain was granted over by the lord. Villains were originally captives at the conqueſt, or troubles before. Villenage could commence no where but in *England*, it was neceſſary to have preſcription for it. A new ſpecies has never ariſen till now; for had it, remedies and powers there would have been at law: Therefore the moſt violent preſumption againſt is the ſilence of the laws, were there nothing more. 'Tis very doubtful whether the laws of *England* will permit a man to bind himſelf by contract to ſerve for life: Certainly will not ſuffer him to inveſt another man with deſpotiſm, nor prevent his own right to diſpoſe of property. If diſallowed by conſent of parties, much more when by force; if made void when commenced here, much more when imported. If theſe are true arguments, they reach the King himſelf as well as the ſubject. Dr. *Rutherforth* ſays, if the civil law of any nation does not allow of ſlavery, priſoners of war cannot be made ſlaves. If the policy of our laws admits not ſlavery, neither fact nor reaſon are for it. A man, it is ſaid, told the judges of the Star-Chamber, in the caſe of a *Ruſſian* ſlave whom they had ordered to be ſcourged and impriſoned, that the air of *England* was too pure for ſlavery. The parliament afterwards puniſhed the judges of the Star-Chamber for ſuch uſage of the *Ruſſian*,

Ruſſian, on his refuſing to anſwer interrogatories. There are very few inſtances, few indeed, of deciſions as to ſlaves, in this country. Two in *Charles* the 2d. where it was adjudged *trover* would lie. *Chamberlayne* and *Perrin*, *Will.* 3d. *trover* brought for taking a negro ſlave, adjudged it would not lie.—4th *Ann.* action of *trover*; judgment by default: On arreſt of judgment, reſolved that *trover* would not lie. Such the determinations in all but two caſes; and thoſe the earlieſt, and diſallowed by the ſubſequent deciſions. Lord *Holt*—As ſoon as a ſlave enters *England* he becomes free. *Stanley* and *Harvey*, on a bequeſt to a ſlave; by a perſon whom he had ſerved ſome years by his former maſter's permiſſion, the maſter claims the bequeſt; Lord *Northington* decides for the ſlave, and gives him coſts. 29th of *George* the 2d. *c.* 31. implies permiſſion in *America*, unhappily thought neceſſary; but the ſame reaſon ſubſiſts not here in *England*. The local law to be admitted when no very great inconvenience would follow; but otherwiſe not. The right of the maſter depends on the condition of ſlavery (ſuch as it is) in *America*. If the ſlave be brought hither, it has nothing left to depend on but a ſuppoſed contract of the ſlave to return; which yet the law of *England* cannot permit. Thus has been traced the only mode of ſlavery ever been eſtabliſhed here, villenage, long expired; I hope it has ſhewn, the introducing new kinds of ſlavery has been cautiouſly, and, we truſt, effectually guarded againſt by the ſame laws. Your lordſhips will indulge me in reciting the practice of foreign nations. 'Tis diſcountenanced in *France*; *Bartholinus de Republicâ* denies its permiſſion by the law of *France*. *Molinus* gives a remarkable inſtance of the ſlave of an ambaſſador of *Spain* brought into *France:* He claims liberty; his claim allowed. *France* even mitigates the ancient ſlavery, far from creating new. *France* does not ſuffer even her King to introduce a new ſpecies of ſlavery. The other parliaments did indeed; but the parliament of *Paris*, conſidering the edict to import ſlavery as an exertion of the ſovereign to the breach of the conſtitution, would not regiſter that edict. Edict 1685, permits ſlavery in the colonies. Edict in 1716, recites the neceſſity to permit in *France*, but under various reſtraints, accurately enumerated in the Inſtitute of *French* Laws. 1759 Admiralty court of *France*; *Cauſes Celebrées*, title *Negro*. A *French* gentleman purchaſed a ſlave, and ſent him to *St Malo's* entruſted with a friend: He came afterwards, and took him to *Paris*. After ten years the ſervant chuſes to leave *France*. The maſter not like Mr. *Stewart* hurries him back by main force, but obtains a proceſs to apprehend him, from a court of juſtice. While in priſon, the ſervant inſtitutes a proceſs againſt his maſter, and is declared free. After the permiſſion of ſlaves in the colonies, the edict of 1716 was neceſſary, to tranſfer that ſlavery to *Paris*; not without many reſtraints, as before remarked; otherwiſe the ancient principles would have prevailed. The author *De Jure Noviſſimo*, tho' the natural tendency of his book, as appears by the title, leads the other way, concurs with diverſe great authorities, in reprobating the introduction of a new ſpecies of ſervitude. In *England*, where freedom is the grand object of the laws, and diſpenſed to the meaneſt individual, ſhall the laws of an infant colony, *Virginia*, or of a barbarous nation, *Africa*, prevail? From the ſubmiſſion of the negro to the laws of *England*, he is liable to all their penalties, and conſequently has a right to their protection. There is one caſe I muſt ſtill mention; ſome criminals having eſcaped execution in *Spain*, were ſet free in *France*. [Lord *Mansfield*—Rightly: for the laws of one country have not whereby to condemn offences ſuppoſed to be committed againſt thoſe of another.]

An objection has ariſen, that the *Weſt India* company, with their trade in ſlaves, having been eſtabliſhed by the law of *England*, it's conſequences muſt be recognized by that law; but the eſtabliſhment is local, and theſe conſequences local; and not the law of *England*, but the law of the Plantations.

The law of *Scotland* annuls the contract to ſerve for life; except in the caſe of colliers, and one other inſtance of a ſimilar nature. A caſe is to be found in the Hiſtory of the Deciſions, where a term of years was diſcharged, as exceeding the uſual limits of human life. At leaſt, if contrary to all theſe deciſions, the court ſhould incline to think Mr. *Stewart* has a title, it muſt be by preſumption of contract, there being no deed in evidence; on this ſuppoſition, Mr. *Stewart* was obliged, undoubtedly, to apply to a court of juſtice. Was it not ſufficient, that without form, without written teſtimony, without even probability of a parol contract, he ſhould venture to pretend a right over the perſon and property of the negro, emancipated, as we contend, by his arrival hither, at a vaſt diſtance from his native country, while he vainly indulged the natural expectation of enjoying liberty, where there was no man who did not enjoy it? Was not this ſufficient, but he muſt ſtill proceed, ſeize the unoffending victim, with no other legal pretence for ſuch a mode of arreſt, but the taking an ill advantage of ſome inaccurate expreſſions in the *Habeas Corpus* Act; and thus pervert an eſtabliſhment deſigned for the perfecting of freedom? I truſt, an exception from a ſingle clauſe, inadvertently worded, (as I muſt take the liberty to remark again) of that one ſtatute, will not be allowed to over-rule the law of *England*. I cannot leave the court, without ſome excuſe for the confuſion in which I roſe, and in which I now appear: For the anxiety and apprehenſion I have expreſſed, and deeply felt. It did not ariſe from want of conſideration, for I have conſidered this cauſe for months, I may ſay years; much leſs did it ſpring from a doubt, how the cauſe might recommend itſelf to the candor and wiſdom of the court. But I felt myſelf over-powered by the weight of the queſtion. I now, in full conviction how oppoſite to natural juſtice Mr. *Stewart*'s claim is, in firm perſuaſion of it's inconſiſtency with the laws of *England*, ſubmit it chearfully to the judgment of this honourable court: And hope as much honour to your lordſhips from the excluſion of this new ſlavery, as our anceſtors obtained by the abolition of the old.

Mr. *Alleyne*—Though it may ſeem preſumption in me to offer any remarks, after the elaborate diſcourſe but now delivered, yet I hope the indulgence of the court; and ſhall confine my obſervations to ſome few points, not included by Mr. *Hargrave*. 'Tis well known to your lordſhips, that much has been aſſerted by the ancient philoſophers and civilians, in defence of the principles of ſlavery: *Ariſtotle* has particularly enlarged on that ſubject. An obſervation ſtill it is, of one of the moſt able, moſt ingenious, moſt convincing writers of modern times, whom I need not heſitate, on this occaſion, to prefer to *Ariſtotle*, the great *Monteſquieu*, that *Ariſtotle*, on this ſubject, reaſoned very unlike the philoſopher. He draws his precedents from barbarous ages and nations, and then deduces maxims from them, for the contemplation and practice of civilized times and countries. If a man who in battle has had his enemy's throat at his ſword's point, ſpares him, and ſays therefore he has power over his life and liberty, is this true? By whatever duty he was bound to ſpare him in battle, (which he always is, when he can with ſafety) by the ſame he obliges himſelf to ſpare the life of the captive, and reſtore his liberty as ſoon as poſſible, conſiſtent with thoſe conſiderations from whence he was authoriſed to ſpare at firſt; the ſame indiſpenſible duty operates throughout. As a contract: In all contracts there muſt be power on one ſide to give, on the other to receive; and a competent conſideration. Now, what power can there be in any man to diſpoſe of all the rights veſted by nature and ſociety in him and his deſcendants? He cannot conſent to part with them, without ceaſing to be a man; for they immediately flow from, and are eſſential to, his condition as ſuch: They cannot be taken from him, for they are not his, as a citizen or a member of ſociety merely; and are not to be reſigned to a power inferior to that which gave them. With reſpect to conſideration, what ſhall be adequate? As a ſpeculative point, ſlavery may a little differ in it's appearance, and the relation of maſter and ſlave, with the obligations on the part of the ſlave, may be conceived; and merely in this view, might be thought to take effect in all places alike; as natural relations always do. But ſlavery is not a natural, 'tis a municipal relation; an inſtitution therefore confined to certain places, and neceſſarily dropt by paſſage into a country where ſuch municipal regulations do not ſubſiſt. The negro making choice of his habitation here, has ſubjected himſelf to the penalties, and is therefore entitled to the protection of our laws. One remarkable caſe ſeems to require being mentioned: Some *Spaniſh* criminals having eſcaped from execution, were ſet free in *France*. [Lord *Mansfield*—Note the diſtinction in the caſe: In this caſe, *France*

was

was not bound to judge by the municipal laws of *Spain*; nor was to take cognizance of the offences ſuppoſed againſt that law.] There has been ſtarted an objection, that a company having been eſtabliſhed by our government for the trade of ſlaves, it were unjuſt to deprive them here.—No: The government incorporated them with ſuch powers as individuals had uſed by cuſtom, the only title on which that trade ſubſiſted; I conceive, that had never extended, nor could extend, to ſlaves brought hither; it was not enlarged at all by the incorporation of that company, as to the nature or limits of it's authority. 'Tis ſaid, let ſlaves know they are all free as ſoon as arrived here, they will flock over in vaſt numbers, over-run this country, and deſolate the plantations. There are too ſtrong penalties by which they will be kept in; nor are the perſons who might convey them over much induced to attempt it; the deſpicable condition in which negroes have the misfortune to be conſidered, effectually prevents their importation in any conſiderable degree. Ought we not, on our part, to guard and preſerve that liberty by which we are diſtinguiſhed by all the earth! to be jealous of whatever meaſure has a tendency to diminiſh the veneration due to the firſt of bleſſings? The horrid cruelties, ſcarce credible in recital, perpetrated in *America*, might, by the allowance of ſlaves amongſt us, be introduced here. Could your lordſhip, could any liberal and ingenuous temper, endure, in the fields bordering on this city, to ſee a wretch bound for ſome trival offence to a tree, torn and agonizing beneath the ſcourge? Such objects might by time become familiar, become unheeded by this nation; exerciſed, as they are now, to far different ſentiments, may thoſe ſentiments never be extinct! the feelings of humanity! the generous ſallies of free minds! May ſuch principles never be corrupted by the mixture of ſlaviſh cuſtoms! Nor can I believe, we ſhall ſuffer any individual living here to want that liberty, whoſe effects are glory and happineſs to the public and every individual.

Mr. *Wallace*—The queſtion has been ſtated, whether the right can be ſupported here; or, if it can, whether a courſe of proceedings at law be not neceſſary to give effect to the right? 'Tis found in three quarters of the globe, and in part of the fourth. In *Aſia* the whole people; in *Africa* and *America* far the greater part; in *Europe* great numbers of the *Ruſſians* and *Polanders*. As to captivity in war, the Chriſtian princes have been uſed to give life to the priſoners; and it took riſe probably in the *Cruſades*, when they gave them life, and ſometimes enfranchiſed them, to enliſt under the ſtandard of the croſs, againſt the *Mahometans*. The right of a conqueror was abſolute in *Europe*, and is in *Africa*. The natives are brought from *Africa* to the *Weſt Indies*; purchaſe is made there, not becauſe of poſitive law, but there being no law againſt it. It cannot be in conſideration by this or any other court, to ſee, whether the *Weſt India* regulations are the beſt poſſible; ſuch as they are, while they continue in force as laws, they muſt be adhered to. As to *England*, not permitting ſlavery, there is no law againſt it; nor do I find any attempt has been made to prove the exiſtence of one. Villenage itſelf has all but the name. Tho' the diſſolution of monaſteries, amongſt other material alterations, did occaſion the decay of that tenure, ſlaves could breathe in *England:* For villains were in this country, and were mere ſlaves, in *Elizabeth*. *Sheppard*'s Abridgment, afterwards, ſays they were worn out in his time. [Lord *Mansfield* mentions an aſſertion, but does not recollect the author, that two only were in *England* in the time of *Charles* the 2d. at the time of the abolition of tenures.] In the caſes cited, the two firſt directly affirm an action of *trover*, an action appropriated to mere common chattels. Lord *Holt*'s opinion, is a mere *dictum*, a deciſion unſupported by precedent. And if it be objected, that a proper action could not be brought, 'tis a known and allowed practice in mercantile tranſactions, if the cauſe ariſes abroad, to lay it within the kingdom: Therefore the contract in *Virginia* might be laid to be in *London*, and would not be traverſable. With reſpect to the other caſes, the particular mode of action was alone objected to; had it been an action *per quod ſervitium amiſit*, for loſs of ſervice, the court would have allowed it. The court called the perſon, for the recovery of whom it was brought, a ſlaviſh ſervant, in *Chamberlayne*'s caſe. Lord *Hardwicke*, and the afterwards Lord Chief Juſtice *Talbot*, then Attorney and Solicitor-General, pronounced a ſlave not free by coming into *England*. 'Tis neceſſary the maſters ſhould bring them over; for they cannot truſt the whites, either with the ſtores or the navigating the veſſel. Therefore, the benefit taken on the *Habeas Corpus* Act ought to be allowed.

Lord *Mansfield* obſerves, The caſe alluded to was upon a petition in *Lincoln's Inn Hall*, after dinner; probably, therefore, might not, as he believes the contrary is not uſual at that hour, be taken with much accuracy. The principal matter was then, on the earneſt ſolicitation of many merchants, to know, whether a ſlave was freed by being made a Chriſtian? And it was reſolved, not. 'Tis remarkable, tho' the *Engliſh* took infinite pains before to prevent their ſlaves being made Chriſtians, that they might not be freed, the *French* ſuggeſted they muſt bring their's into *France*, (when the edict of 1706 was petitioned for,) to make them Chriſtians. He ſaid, the diſtinction was difficult as to ſlavery, which could not be reſumed after emancipation, and yet the condition of ſlavery, in it's full extent, could not be tolerated here. Much conſideration was neceſſary, to define how far the point ſhould be carried. The court muſt conſider the great detriment to proprietors, there being ſo great a number in the ports of this kingdom, that many thouſands of pounds would be loſt to the owners, by ſetting them free. (A gentleman obſerved, no great danger; for in a whole fleet, uſually, there would not be ſix ſlaves.) As to *France*, the caſe ſtated decides no further farther than that kingdom; and there freedom was claimed, becauſe the ſlave had not been regiſtered in the port where he entered, conformably to the edict of 1706. Might not a ſlave as well be freed by going out of *Virginia* to the adjacent country, where there are no ſlaves, if change to a place of contrary cuſtom was ſufficient? A ſtatute by the legiſlature, to ſubject the *Weſt India* property to payment of debts, I hope, will be thought ſome proof; another act deveſts the *African* Company of their ſlaves, and veſts them in the *Weſt India* Company: I ſay, I hope theſe are proofs the law has interfered for the maintenance of the trade in ſlaves, and the transferring of ſlavery. As for want of application properly to a court of juſtice; a common ſervant may be corrected here by his maſter's private authority. *Habeas corpus* acknowledges a right to ſeize perſons by force employed to ſerve abroad. A right of compulſion there muſt be, or the maſter will be under the ridiculous neceſſity of neglecting his proper buſineſs, by ſtaying here to have their ſervice, or muſt be quite deprived of thoſe ſlaves he has been obliged to bring over. The caſe, as to ſervice for life was not allowed, merely for want of a deed to paſs it.

The court approved Mr. *Alleyne*'s opinion of the diſtinction, how far municipal laws were to be regarded: Inſtanced the right of marriage; which, properly ſolemnized, was in all places the ſame, but the regulations of power over children from it, and other circumſtances, very various; and adviſed, if the merchants thought it ſo neceſſary, to apply to parliament, who could make laws.

Adjourned till that day ſe'nnight.

Mr. *Dunning*—'Tis incumbent on me to juſtify Captain *Knowles*'s detainer of the negro; this will be effected, by proving a right in Mr. *Stewart*; even a ſuppoſed one: For till that matter was determined, it were ſomewhat unaccountable that a negro ſhould depart his ſervice, and put the means out of his power of trying that right to effect, by a flight out of the kingdom. I will explain what appears to me the foundation of Mr. *Stewart*'s claim. Before the writ of *habeas corpus* iſſued in the preſent caſe, there was, and there ſtill is, a great number of ſlaves in *Africa*, (from whence the *America* plantations are ſupplied) who are ſaleable, and in fact ſold. Under all theſe deſcriptions is *James Somerſet*. Mr. *Stewart* brought him over to *England*; purpoſing to return to *Jamaica*, the negro choſe to depart the ſervice, and was ſtopt and detained by Captain *Knowles*, 'till his maſter ſhould ſet ſail and take him away to be ſold in *Jamaica*. The gentlemen on the other ſide, to whom I impute no blame, but on the other hand much commendation, have advanced many ingenious propoſitions; part of which are undeniably true, and part (as is uſual in compoſitions of ingenuity) very diſputable. 'Tis my misfortune to addreſs an audience, the greater part of which, I fear, are prejudiced the other way. But wiſhes, I am well convinced, will never enter into your lordſhips minds, to influence the determination of the point: This cauſe muſt be what in fact and law it is; it's fate, I truſt, therefore, depends on fixt invariable rules, reſulting by law from the nature of the caſe. For myſelf, I would not be underſtood to intimate a wiſh in favour of ſlavery, by any means; nor on the other ſide, to be ſuppoſed maintainer of an opinion contrary to my own judgment. I am bound by duty to maintain thoſe arguments which are moſt uſeful to Captain *Knowles*, as far as is conſiſtent with truth; and if his conduct has been agreeable to the laws throughout, I am under a farther indiſpenſable duty to ſupport it. I aſk no other attention than may naturally reſult from the importance of the queſtion: Leſs than this I have no reaſon to expect; more, I neither demand nor wiſh to have allowed. Many alarming apprehenſions have been entertained of the conſequence of the deciſion, either way. About 14,000 ſlaves, from the moſt exact intelligence I am able to procure, are at preſent here; and ſome little time paſt, 166,914 in *Jamaica*; there are, beſides, a number of wild negroes in the woods. The computed value of a negro in thoſe parts 50 *l.* a head. In the other iſlands I cannot ſtate with the ſame accuracy, but on the whole they are about as many. The means of conveyance, I am told, are manifold; every family almoſt brings over a great number; and will, be the deciſion on which ſide it may. Moſt negroes who have money (and that deſcription I believe will include nearly all) make intereſt with the common ſailors to be carried hitherto. There are negroes not falling under the proper denomination of any yet mentioned, deſcendants of the original ſlaves, the aborigines, if I may call them ſo; theſe have gradually acquired a natural attachment to their country and ſituation; in all inſurrections they ſide with their maſters: Otherwiſe, the vaſt diſproportion of the negroes to the whites, (not leſs probably than that of 100 to one) would have been fatal in it's conſequences. There are very ſtrong and particular grounds of apprehenſion, if the relation in which they ſtand to their maſters is utterly to be diſſolved on the inſtant of their coming into *England*. Slavery, ſay the gentlemen, is an odious thing; the name is: And the reality; if it were as one has defined, and the reſt ſuppoſed it. If it were neceſſary to the idea and the exiſtence of *James Somerſet*, that his maſter, even here, might kill, nay, might eat him, might ſell living or dead, might make him and his deſcendants property alienable, and thus tranſmiſſible to poſterity; this, how high ſoever my ideas may be of the duty of my profeſſion, is what I ſhould decline pretty much to defend or aſſert, for any purpoſe, ſeriouſly; I ſhould only ſpeak of it to teſtify my contempt and abhorrence. But this is what at preſent I am not at all concerned in; unleſs Captain *Knowles*, or Mr. *Stewart*, have killed or eat him. Freedom has been aſſerted as a natural right, and therefore unalienable and unreſtrainable; there is perhaps no branch of this right, but in ſome at all times, and in all places at different times, has been reſtrained: Nor could ſociety otherwiſe be conceived to exiſt. For the great benefit of the public and individuals, natural liberty, which conſiſts in doing what one likes, is altered to the doing what one ought. The gentlemen who have ſpoke with ſo much zeal, have ſuppoſed different ways by which ſlavery commences; but have omitted one, and rightly; for it would have given a more favourable idea of the nature of that power againſt which they combate. We are apt (and great authorities ſupport this way of ſpeaking) to call thoſe nations univerſally, whoſe internal police we are ignorant of, barbarians; (thus the *Greeks*, particularly, ſtiled many nations, whoſe cuſtoms, generally conſidered, were far more juſtifiable and commendable than their own:) Unfortunately, from calling them barbarians, we are apt to think them ſo, and draw concluſions accordingly. There are ſlaves in *Africa* by captivity in war, but the number far from great; the country is divided into many ſmall, ſome great territories, who do, in their wars with one another, uſe this cuſtom. There are of theſe people, men who have a ſenſe of the right and value of freedom; but who imagine that offences againſt ſociety are puniſhable juſtly by the ſevere law of ſervitude. For crimes againſt property, a conſiderable addition is made to the number of ſlaves. They have a proceſs by which the quantity of the debt is aſcertained; and if all the property of the debtor in goods and chattels is inſufficient, he who has thus diſſipated all he has beſides, is deemed property himſelf; the proper officer (ſheriff we may call him) ſeizes the inſolvent, and diſpoſes of him as a ſlave. We don't contend under which of theſe the unfortunate man in queſtion is; but his condition was that of ſervitude in *Africa*; the law of the land of that country diſpoſed of him as property, with all the conſequences of tranſmiſſion and alienation; the ſtatutes of the *Britiſh* legiſlature confirm this condition; and thus he was a ſlave both in law and fact. I do not aim at proving theſe points; not becauſe they want evidence, but becauſe they have not been controverted, to my recollection, and are, I think, incapable of denial. Mr. *Stewart*, with this right, croſſed the *Atlantic*, and was not to have the ſatisfaction of diſcovering, till after his arrival in this country, that all relation between him and the negro, as maſter and ſervant, was to be matter of controverſy, and of long legal diſquiſition. A few words may be proper, concerning the *Ruſſian* ſlave, and the proceedings of the Houſe of Commons on that caſe. 'Tis not abſurd in the idea, as quoted, nor improbable as matter of fact; the expreſſion has a kind of abſurdity. I think, without any prejudice to Mr. *Stewart*, or the merits of this cauſe, I may admit the utmoſt poſſible to be deſired, as far as the caſe of that ſlave goes. The maſter and ſlave were both, (or ſhould have been at leaſt) on their coming here, new creatures. *Ruſſian* ſlavery, and even the ſubordination amongſt themſelves, in the degree they uſe it, is not here to be tolerated. Mr. *Alleyne* juſtly obſerves, the municipal regulations of one country are not binding on another; but does the relation ceaſe where the modes of creating it, the degrees in which it ſubſiſts, vary? I have not heard, nor, I fancy, is there any intention to affirm, the relation of maſter and ſervant ceaſes here? I underſtand the municipal relations differ in different colonies, according to humanity, and otherwiſe. A diſtinction was endeavoured to be eſtabliſhed between natural and municipal relations; but the natural relations are not thoſe only which attend the perſon of the man, political do ſo too; with which the municipal are moſt cloſely connected: Municipal laws, ſtrictly, are thoſe confined to a particular place; political, are thoſe in which the municipal laws of many ſtates may and do concur. The relation of huſband and wife, I think myſelf warranted in queſtioning, as a natural relation: Does it ſubſiſt for life; or to anſwer the natural purpoſes which may reaſonably be ſuppoſed often to terminate ſooner? Yet this is one of thoſe relations which follow a man every where. If only natural relations had that property, the effect would be very limited indeed. In fact, the municipal laws are principally employed in determining the manner by which relations are created; and which manner varies in various countries, and in the ſame country at different periods; the political relation itſelf continuing uſually unchanged by the change of place. There is but one form at preſent with us, by which the relation of huſband and wife can be conſtituted; there was a time when otherwiſe: I need not ſay other nations have their own modes, for that and other ends of ſociety. Contract is not the only means, on the other hand, of producing the relation of maſter and ſervant; the magiſtrates are empowered to oblige perſons under certain circumſtances to ſerve. Let me take notice, neither the air of *England* is too pure for a ſlave to breathe in, nor the laws of *England* have rejected ſervitude. Villenage in this country is ſaid to be worn out; the propriety of the expreſſion ſtrikes me a little. Are the laws not exiſting by which it was created? A matter of more curioſity than uſe, it is, to enquire when that ſet of people ceaſed. The Statute of Tenures did not however aboliſh villenage in groſs; it left perſons of that condition in the ſame ſtate as before; if their deſcendants are all dead, the gentlemen are right to ſay the ſubject of thoſe laws is gone, but not the law; if the ſubject revives, the law will lead the ſubject. If the ſtatute of *Charles* the 2d. ever be repealed, the law of villenage revives in it's full force. If my learned brother, the ſerjeant, or the other gentlemen who argued on the ſuppoſed ſubject of freedom, will go thro' an operation my reading aſſures me will be ſufficient for that purpoſe, I ſhall claim them as property. I won't, I aſſure them, make a rigorous uſe of my power; I will neither ſell them, eat them, nor part with them. It would be a great ſurprize, and ſome incovenience, if a foreigner bringing over a ſervant, as ſoon as he got hither, muſt take care of his carriage, his horſe, and himſelf, in whatever method he might have the luck to invent. He muſt find his way to *London* on foot. He tells his ſervant, Do this; the ſervant replies, Before I do it, I think fit to inform you, Sir, the firſt ſtep on this happy land ſets all men on a perfect level; you are juſt as much obliged to obey my commands. Thus neither ſuperior, or inferior, both go without their dinner. We ſhould find ſingular comfort, on entering the limits of a foreign country, to be thus at once deveſted of all attendance and all accommodation. The gentlemen have collected more reading than I have leiſure to collect, or induſtry (I muſt own) if I had leiſure: Very laudable pains has been taken, and very ingenious, in collecting the ſentiments of other countries, which I ſhall not much regard, as affecting the point or juriſdiction of this court. In *Holland*, ſo far from perfect freedom, (I ſpeak from knowledge) there are, who without being conſcious of contract, have for offences perpetual labour impoſed, and death the condition annext to non-performance. Either all the different ranks muſt be allowed natural, which is not readily conceived, or there are political ones, which ceaſe not on change of ſoil. But in what manner is the negro to be treated? How far lawful to detain him? My footman, according to my agreement, is obliged to attend me from this city, or he is not; if no condition, that he ſhall not be obliged to attend, from hence he is obliged, and no injury done.

A ſervant of a ſheriff, by the command of his maſter, laid hand gently on another ſervant of his maſter, and brought him before his maſter, who himſelf compelled the ſervant to his duty; an action of aſſault and battery, and falſe impriſonment, was brought; and the principal queſtion was, on demurrer, whether the maſter could command the ſervant, tho' he might have juſtified his taking of the ſervant by his own hands? The convenience of the public is far better provided for, by this private authority of the maſter, than if the lawfulneſs of the command were liable to be litigated every time a ſervant thought fit to be negligent or troubleſome.

Is there a doubt, but a negro might interpoſe in the defence of a maſter, or a maſter in defence of a negro? If to all purpoſes of advantage, mutuality requires the rule to extend to thoſe of diſadvantage. 'Tis ſaid, as not formed by contract, no reſtraint can be placed by contract. Which ever way it was formed, the conſequences, good or ill, follow from the relation, not the manner of producing it. I may obſerve, there is an eſtabliſhment, by which magiſtrates compel idle or diſſolute perſons, of various ranks and denominations, to ſerve. In the caſe of apprentices bound out by the pariſh, neither the trade is left to the choice of thoſe who are to ſerve, nor the conſent of parties neceſſary; no contract therefore is made in the former inſtance, none in the latter; the duty remains the ſame. The caſe of contract for life quoted from the Year-Books, was recognized as valid; the ſolemnity only of an inſtrument judged requiſite.

Your

Your lordſhips, (this variety of ſervice, with diverſe other ſorts, exiſting by law here,) have the option of claſſing him amongſt thoſe ſervants which he moſt reſembles in condition: Therefore, (it ſeems to me) are by law authoriſed to enforce a ſervice for life in the ſlave, that being a part of his ſituation before his coming hither; which, as not incompatible, but agreeing with our laws, may juſtly ſubſiſt here: I think, I might ſay, muſt neceſſarily ſubſiſt, as a conſequence of a previous right in Mr. *Stewart*, which our inſtitutions not diſſolving, confirm. I don't inſiſt on all the conſequences of villenage; enough is eſtabliſhed for our cauſe, by ſupporting the continnance of the ſervice. Much has been endeavoured, to raiſe a diſtinction, as to the lawfulneſs of the negro's commencing ſlave, from the difficulty or impoſſibility of diſcovery by what means, under what authority, he became ſuch. This, I apprehend, if a curious ſearch were made, not utterly inexplicable; nor the legality of his original ſervitude difficult to be proved. But to what end? Our legiſlature, where it finds a relation exiſting, ſupports it in all ſuitable conſequences, without uſing to enquire how it commenced. A man enliſts for no ſpecified time; the contract in conſtruction of law, is for a year: The legiſlature, when once the man is enliſted, interpoſes annually to continue him in the ſervice, as long as the public has need of him. In times of public danger he is forced into the ſervice; the laws from thence forward find him a ſoldier, make him liable to all the burthen, confer all the rights (if any rights there are of that ſtate) and enforce all penalties of neglect of any duty in that profeſſion, as much and as abſolutely, as if by contract he had ſo diſpoſed of himſelf. If the court ſee a neceſſity of entering into the large field of argument, as to right of the unfortunate man, and ſervice appears to them deducible from a diſcuſſion of that nature to him, I neither doubt they will, nor wiſh they ſhould not. As to the purpoſe of Mr. *Stewart* and Captain *Knowles*, my argument does not require *trover* ſhould lie, as for recovering of property, nor treſpaſs: A form of action there is, the writ *per quod ſervitium amiſit*, for loſs of ſervice, which the court would have recognized; if they allowed the means of ſuing a right, they allowed the right. The opinion cited, to prove the negroes free on coming hither, only declares them not ſaleable; does not take away their ſervice. I would ſay, before I conclude, not for the ſake of the court, of the audience; the matter now in queſtion, intereſts the zeal for freedom of no perſon, if truly conſidered; it being only, whether I muſt apply to a court of juſtice, (in a caſe, where if the ſervant was an *Engliſhman* I might uſe my private authority to enforce the performance of the ſervice, according to it's nature,) or may, without force or outrage, take my ſervant myſelf, or by another. I hope, therefore, I ſhall not ſuffer in the opinion of thoſe whoſe honeſt paſſions are fired at the name of ſlavery. I hope I have not tranſgreſſed my duty to humanity; nor doubt I your lordſhips diſcharge of yours to juſtice.

Serjeant *Davy*—My learned friend has thought proper to conſider the queſtion in the beginning of his ſpeech, as of great importance: 'Tis indeed ſo; but not for thoſe reaſons principally aſſigned by him. I apprehend, my lord, the honour of *England*, the honour of the laws of every *Engliſhman*, here or abroad, is now concerned. He obſerves, the number is 14,000 or 15,000; if ſo, high time to put an end to the practice; more eſpecially, ſince they muſt be ſent back as ſlaves, tho' ſervants here. The increaſe of ſuch inhabitants, not intereſted in the proſperity of a country, is very pernicious; in an iſland, which can, as ſuch, not extend it's limits, nor conſequently maintain more than a certain number of inhabitants, dangerous in exceſs. Money from foreign trade (or any other means) is not the wealth of a nation; nor conduces any thing to ſupport it, any farther than the produce of the earth will anſwer the demand of neceſſaries. In that caſe money enriches the inhabitants, as being the common repreſentative of thoſe neceſſaries; but this repreſentation is merely imaginary and uſeleſs, if the encreaſe of people exceeds the annual ſtock of proviſions requiſite for their ſubſiſtence. Thus, foreign ſuperfluous inhabitants augmenting perpetually, are ill to be allowed; a nation of enemies in the heart of a ſtate, ſtill worſe. Mr. *Dunning* availed himſelf of a wrong interpretation of the word natural: It was not uſed in the ſenſe in which he thought fit to underſtand that expreſſion; 'twas uſed as moral, which no laws can ſupercede. All contracts, I do not venture to aſſert are of a moral nature; but I know not any law to confirm an immoral contract, and execute it. The contract of marriage is a moral contract, eſtabliſhed for moral purpoſes, enforcing moral obligations; the right of taking property by deſcent, the legitimacy of children; (who in *France* are conſidered legitimate, tho' born before the marriage, in *England* not:) Theſe, and many other conſequences, flow from the marriage properly ſolemnized; are governed by the municipal laws of that particular ſtate, under whoſe inſtitutions the contracting and diſpoſing parties live as ſubjects; and by whoſe eſtabliſhed forms they ſubmit the relation to be regulated, ſo far as it's conſequences, not concerning the moral obligation, are intereſted. In the caſe of *Thorn* and *Watkins*, in which your lordſhip was counſel, determined before Lord *Hardwicke*.—A man died in *England*, with effects in *Scotland*; having a brother of the whole, and a ſiſter of the half blood: The latter, by the laws of *Scotland* could not take. The brother applies for adminiſtration to take the whole eſtate, real and perſonal, into his own hands, for his own uſe; the ſiſter files a bill in Chancery. The then Mr. Attorney-General puts in anſwer for the defendant; and affirms, the eſtate, as being in *Scotland*, and deſcending from a *Scotchman*, ſhould be governed by that law. Lord *Hardwicke* over-ruled the objection againſt the ſiſter's taking; declared there was no pretence for it; and ſpoke thus, to this effect, and nearly in the following words—Suppoſe a foreigner has effects in our ſtocks, and dies abroad; they muſt be diſtributed according to the laws, not of the place where his effects were, but of that to which as a ſubject he belonged at the time of his death. All relations governed by municipal laws, muſt be ſo far dependant on them, that if the parties change their country the municipal laws give way, if contradictory to the political regulations of that other country. In the caſe of maſter and ſlave, being no moral obligation, but founded on principles, and ſupported by practice, utterly foreign to the laws and cuſtoms of this country, the law cannot recognize ſuch relation. The arguments founded on municipal regulations, conſidered in their proper nature, have been treated ſo fully, ſo learnedly, and ably, as ſcarce to leave any room for obſervations on that ſubject: Any thing I could offer to enforce, would rather appear to weaken the propoſition, compared with the ſtrength and propriety with which that ſubject has already been explained and urged. I am not concerned to diſpute, the negro may contract to ſerve; nor deny the relation between them, while he continues under his original proprietor's roof and protection. 'Tis remarkable, in all *Dyer*, for I have cauſed a ſearch to be made as far as the 4th of *Henry* 8th, there is not one inſtance of a man's being held a villain who denied himſelf to be one; nor can I find a confeſſion of villenage in thoſe times. [Lord *Mansfield*, the laſt confeſſion of villenage extant, is in the 19th of *Henry* the 6th.] If the court would acknowledge the relation of maſter and ſervant, it certainly would not allow the moſt exceptionable part of ſlavery; that of being obliged to remove, at the will of the maſter, from the protection of this land of liberty, to a country where there are no laws; or hard laws to inſult him. It will not permit ſlavery ſuſpended for a while, ſuſpended during the pleaſure of the maſter. The inſtance of maſter and ſervant commencing without contract; and that of apprentices againſt the will of the parties, (the latter found in it's conſequences exceedingly pernicious;) both theſe are provided by ſpecial ſtatutes of our own municipal law. If made in *France*, or any where but here, they would not have been binding here. To puniſh not even a criminal for offences againſt the laws of another country; to ſet free a galley-ſlave, who is a ſlave by his crime; and make a ſlave of a negro, who is one, by his complexion; is a cruelty and abſurdity that I truſt will never take place here: Such as, if promulged, would make *England* a diſgrace to all the nations under earth: For the reducing a man, guiltleſs of any offence againſt the laws, to the condition of ſlavery, the worſt and moſt abject ſtate, Mr. *Dunning* has mentioned, what he is pleaſed to term philoſophical and moral grounds, I think, or ſomething to that effect, of ſlavery; and would not by any means have us think diſreſpectfully of thoſe nations, whom we miſtakenly call barbarians, merely for carrying on that trade: For my part, we may be warranted, I believe, in affirming the morality or propriety of the practice does not enter their heads; they make ſlaves of whom they think fit. For the air of *England*; I think, however, it has been gradually purifying ever ſince the reign of *Elizabeth*. Mr. *Dunning* ſeems to have diſcovered ſo much, as he finds it changes a ſlave into a ſervant; tho' unhappily, he does not think it of efficacy enough to prevent that peſtilent diſeaſe reviving, the inſtant the poor man is obliged to quit (voluntarily quits, and legally, it ſeems we ought to ſay,) this happy country. However, it has been aſſerted, and is now repeated by me, this air is too pure for a ſlave to breathe in: I truſt, I ſhall not quit this court without certain conviction of the truth of that aſſertion.

Lord *Mansfield*—The queſtion is, if the owner had a right to detain the ſlave, for the ſending of him over to be ſold in *Jamaica*. In five or ſix caſes of this nature, I have known it to be accommodated by agreement between the parties: On it's firſt coming before me, I ſtrongly recommended it here. But if the parties will have it decided, we muſt give our opinion. Compaſſion will not, on the one hand, nor inconvenience on the other, be to decide; but the law: In which the difficulty will be principally from the inconvenience on both ſides. Contract for ſale of a ſlave is good here; the ſale is a matter to which the law properly and readily attaches, and will maintain the price according to the agreement. But here the perſon of the ſlave himſelf is immediately the object of enquiry; which makes a very material difference. The now queſtion is, whether any dominion, authority or coercion can be exerciſed in this country, on a ſlave according to the *American* laws? The difficulty of adopting the relation, without adopting it in all it's conſequences, is indeed extreme; and yet, many of thoſe conſequences are abſolutely contrary to the municipal law of *England*. We have no authority to regulate the conditions in which law ſhall operate. On the other hand, ſhould we think the coercive power cannot be exerciſed: 'Tis now about fifty years ſince the opinion given by two of the greateſt men of their own or any times, (ſince which no contract has been brought to trial, between the maſters and ſlaves;) the ſervice performed by the ſlaves without wages, is a clear indication they did not think themſelves free by coming hither. The ſetting 14,000 or 15,000 men at once free looſe by a ſolemn opinion, is much diſagreeable in the effects it threatens. There is a caſe in *Hobart*, (*Coventry* and *Woodfall*,) where a man had contracted to go as a mariner: But the now caſe will not come within that deciſion. Mr. *Stewart* advances no claim on contract; he reſts his whole demand on a right to the negro as ſlave, and mentions the purpoſe of detainure to be the ſending of him over to be ſold in *Jamaica*. If the parties will have judgment, *fiat juſtitia, ruat cœlum*, let juſtice be done whatever be the conſequence. 50 *l.* a head may not be a high price; then a loſs follows to the proprietors of above 700,000*l.* ſterling. How would the law ſtand with reſpect to their ſettlement; their wages? How many actions for any ſlight coercion by the maſter? We cannot in any of theſe points direct the law; the law muſt rule us. In theſe particulars, it may be matter of weighty conſideration, what proviſions are made or ſet by law. Mr. *Stewart* may end the queſtion, by diſcharging or giving freedom to the negro. I did think at firſt to put the matter to a more ſolemn way of argument: But if my brothers agree, there ſeems no occaſion. I do not imagine, after the point has been diſcuſſed on both ſides ſo extremely well, any new light could be thrown on the ſubject. If the parties chuſe to refer it to the Common Pleas, they can give themſelves that ſatisfaction whenever they think fit. An application to parliament, if the merchants think the queſtion of great commercial concern, is the beſt, and perhaps the only method of ſettling the point for the future. The court is greatly obliged to the gentlemen of the bar who have ſpoke on the ſubject; and by whoſe care and abilities ſo much has been effected, that the rule of deciſion will be reduced to a very eaſy compaſs. I cannot omit to expreſs particular happineſs in ſeeing young men, juſt called to the bar, have been able ſo much to profit by their reading. I think it right the matter ſhould ſtand over; and if we are called on for a deciſion, proper notice ſhall be given.

Trinity Term, *June* 22, 1772.

Lord *Mansfield*—On the part of *Somerſet*, the caſe which we gave notice ſhould be decided this day, the court now proceeds to give it's opinion. I ſhall recite the return to the writ of *habeas corpus*, as the ground of our determination; omitting only words of form. The captain of the ſhip on board of which the negro was taken, makes his return to the writ in terms ſignifying that there have been, and ſtill are, ſlaves to a great number in *Africa*; and that the trade in them is authorized by the laws and opinions of *Virginia* and *Jamaica*; that they are goods and chattels; and, as ſuch, ſaleable and ſold. That *James Somerſet*, is a negro of *Africa*, and long before the return of the king's writ was brought to be ſold, and was ſold to *Charles Stewart* Eſq. then in *Jamaica*, and has not been manumitted ſince; that Mr. *Stewart*, having occaſion to tranſact buſineſs, came over hither, with an intention to return; and brought *Somerſet*, to attend and abide with him, and to carry him back as ſoon as the buſineſs ſhould be tranſacted. That ſuch intention has been, and ſtill continues; and that the negro did remain till the time of his departure, in the ſervice of his maſter Mr. *Stewart*, and quitted it without his conſent; and thereupon, before the return of the king's writ, the ſaid *Charles Stewart* did commit the ſlave on board the *Ann* and *Mary*, to ſafe cuſtody, to be kept till he ſhould ſet ſail, and then to be taken with him to *Jamaica*, and there ſold as a ſlave. And this is the cauſe why he, Captain *Knowles*, who was then and now is, commander of the above veſſel, then and now lying in the river of *Thames*, did the ſaid negro, committed to his

cuſtody,

cuſtody, detain; and on which he now renders him to the orders of the court. We pay all due attention to the opinion of Sir *Philip Yorke*, and Lord Chief Juſtice *Talbot*, whereby they pledged themſelves to the *Britiſh* planters, for all the legal conſequences of ſlaves coming over to this kingdom or being baptized, recognized by Lord *Hardwicke*, ſitting as Chancellor on the 19th of *October* 1749, that *trover* would lie: That a notion had prevailed, if a negro came over, or became a chriſtian, he was emancipated, but no ground in law; that he and Lord *Talbot*, when Attorney and Solicitor-General, were of opinion, that no ſuch claim for freedom was valid; that tho' the Statute of Tenures had aboliſhed villains regardant to a manor, yet he did not conceive but that a man might ſtill become a villain in groſs, by confeſſing himſelf ſuch in open court. We are ſo well agreed, that we think there is no occaſion of having it argued (as I intimated an intention at firſt,) before all the judges, as is uſual, for obvious reaſons, on a return to a *habeas corpus*; the only queſtion before us is, whether the cauſe on the return is ſufficient? If it is, the negro muſt be remanded; if it is not, he muſt be diſcharged. Accordingly, the return ſtates, that the ſlave departed and refuſed to ſerve; whereupon he was kept, to be ſold abroad. So high an act of dominion muſt be recognized by the law of the country where it is uſed. The power of a maſter over his ſlave has been extremely different, in different countries. The ſtate of ſlavery is of ſuch a nature, that it is incapable of being introduced on any reaſons, moral or political; but only poſitive law, which preſerves it's force long after the reaſons, occaſion, and time itſelf from whence it was created, is eraſed from memory: It's ſo odious, that nothing can be ſuffered to ſupport it, but poſitive law. Whatever inconveniences, therefore, may follow from a deciſion, I cannot ſay this caſe is allowed or approved by the law of *England*; and therefore the black muſt be diſcharged.

Pitt *againſt* Harbin.

MRS. *Harbin* deviſed to her four nieces, and on the death of any of them without iſſue, the whole ſhould go to the ſurvivor or ſurvivors; but if any of her ſaid nieces died, having child or children, then the ſhare to go to ſuch child or children; if all died without iſſue, then the whole to her nephew.

Catherine Pitt, one of the nieces, married *G. Pitt*, and had iſſue *W.* and *G.* Both died in the life of their mother; *G. Pitt* left iſſue *Eliz.* and *G.* grand-children of *C.* the three other nieces died without iſſue, one in 1712, *C.* in 1745, and another in 1759, and *F.* in 1765. The will was made in 1705.

On the death of *F.* the grand-children of *C.* claim the whole. On the other hand, the repreſentatives of Mrs. *Harbin* ſay, that nothing but the ſingle ſhare which *C.* took by ſurvivorſhip goes to the grand-children of *C.*

It was argued, that if a niece left children, 'twas meant thoſe children ſhould take all by ſurvivorſhip, which their parent could have taken if living; and all that on failure of iſſue was to have gone over to the nephew of the teſtatrix, which was the whole. And that the nieces who ſurvived *C.* and died without iſſue, could take only a life intereſt, which they could have preferably to the iſſue of the deceaſed ſiſter, but no more; they could not take any part but by implication, being grand-children, and not children; and if they take at all by implication, they ſhall take the whole. On the other hand, that conſiſtently with the intention of the teſtator, no ſurvived ſhare can go to the repreſentatives of the dead niece. How is it poſſible, if there be an accrued ſhare to ſiſters repreſentatives during the term, the whole ſhould go to the nephew? And yet the whole is to go to him, or none.

Can the children of *C.* take? The teſtatrix ſays there ſhall be no ſurvivorſhip. They can take no more than *C.* at her death was intitled to, which was only her own and the ſhare of one of the ſiſters. If *C.* had ſurvived all four ſiſters, they would then have been to take the whole. It was contended, on the part of the children, they ſhould take as of property undiſpoſed any where elſe.

Sir *Thomas Sewell*, Maſter of the Rolls—The intention of the teſtatatrix, clearly made out from the will, is, that the children, if any, ſhould take the whole. I think no conjecture ſhould be drawn; but from neceſſary implication, the will muſt be preſerved.

She gives in legacies 150*l.* to her brothers and ſiſters, and 20*l.* to one niece, 10*l.* apiece to the other three.

She limits the intereſt for as much of the term as ſhall run out during the life of her nieces; but this no more, expreſsly, than a life intereſt to the nieces, remainder in the term to children, if any; and if any of the nieces die without children, then the part or ſhare ſhall go to the ſurvivor or ſurvivors. The laſt died without children; and here riſes the difficulty. She meant, I think, not only the ſhare accruing to the ſiſter leaving iſſue at the time of her deceaſe, but all the ſurvivorſhips of the other ſhares, to go to her child or children; if other or others had been here, inſtead of ſurvivor or ſurvivors, there could have been no doubt: The meaning then muſt have been, the children ſhould take; the whole ſhare ſhould have gone to the children. Suppoſe it otherwiſe, on the child or children dying in the life-time of any of the four ſiſters, the ſhare of the children would have been taken out of their repreſentatives, and gone to Mr. *Wyndham*, which is abſurd.

Directions given accordingly.

Univerſity Caſes.

Marriet *againſt* Gregory.

INFORMATION in the nature of a *quo warranto* againſt the defendant, to ſhew cauſe, why he holds the office of fellow of *Trinity-Hall*. The election was by the fellows, in the abſence of the maſter. It appeared, it ſeems, on affidavits, that the maſter by the ſtatute was to be forewarned and waited for; that the election was to have ten days notice, was not to be in vacation; and that in twenty-eight days, incluſive of the ten, the election muſt be made, otherwiſe lapſe to the maſter; and that the maſter muſt reſide, and not even lye a night out without leave of the college. Dr. *Marriet* being abſent, the fellows gave notice on the firſt day of term, that an election will be on the 20th of *October*. The maſter writes word, being abſent, that his health will not permit him to come before the 8th of *November*, (which was a day after the twenty-eight days;) but that if he does not come then, they may go on without him. They did not elect till the 3d of *November*. Objected, that this election was bad, and conſequently the title of Mr. *Gregory*; that they ſhould have waited for the maſter; that the election could not be good in his abſence; and that at leaſt, in this, the title of the gentleman choſen as fellow was bad, that he was admitted without the maſter. On the other hand, that the court had not ſtrictly an authority to grant informations; for that colleges in the univerſity were not within the ſtatute of 9 Queen *Ann*; but that they were agreed to waive exceptions of form, and reſt on the merits. That the maſter was bound to have been reſident, that he was both *præmonitas & expectatus*, according to the ſtatute, forewarned and expected, a reaſonable time; that he had no right to appoint a day; that if he had been there, and had not given a vote, they might, by the ſtatute, have elected without him: The ſame if he was abſent beyond due time, and had by his refuſal to attend precluded himſelf from giving a vote. That had he been preſent, and had given a vote with the minority, the election by the majority would have been good without him; much more, when he choſe to be abſent, having due notice, and more than was ſtrictly due; and that the election was therefore good. Contended by Mr. *Dunning*, that it was not good.

A form of government there muſt be in the college ſubſiſting in ſome perſons, and to which an head is neceſſary.

The ſtatutes of the founder have appointed an head; that is, the maſter. "*Conforment ſocii cuſtodis ſuffragio*," are the words. *Præſentia cuſtodis neceſſario requiritur, ſuffragia majoris partis ſociorum ſufficiant, ſi magiſter votim non dederit, aut ſi alia parte det.* The power of the maſter was reſtrained from ſtopping the election, and alſo from abſenting himſelf *ſi præmonitio fuerit & expectatus fuerit, neque intereſſe voluit*, the fellows may elect.

There can be no reaſon to raiſe a doubt, more than if the conſtitution had been recent. Plea of uſage avails not againſt the maſter.

The maſters have uſually been of another college; are not bound by the conſtitutions to attend; but have a right. Forty electors in his abſence, againſt five in his preſence, are of no import; he has probably in moſt, certainly in many, by his ſubſtitute been preſent; as by the conſtitution he might. Had this been in the caſe before the court, probably the five and the forty would have changed ſides.

An inſtance ſhould have been brought, when he had expreſſed his pleaſure to be there, and they had proceeded without him, and the election allowed.

By the college ſtatutes, there is a prohibition to proceed to election in vacation, and till after ten days are expired, that abſent fellows may have an opportunity to attend, in expreſs terms. Exceptions have been taken, by his adverſaries, againſt Dr. *Marriet*'s abſence; though, I believe, they ſet him the example.

Exceptions to the vaſt difficulty of informing the maſter of the election propoſed; as if all the buſineſs, real buſineſs in the world, were confined within the college walls; and as if the ſame monks filled thoſe walls as formerly, who did not know where *London* ſtood.

Therefore, on the eleventh day, without notice, the fellows proceeded to the election; as if it were not only competent under the ſtatute, but neceſſary, to proceed immediately. Wherever the founder has not limited the maſter's authority, he may make bye laws not inconſiſtent with the law of the land; unleſs the appointment of a ſubſtitute had been provided, they could not without notice have concluded the election without his perſonal appearance.

In the caſe of the Mayor of *Bedford*, who abſented himſelf on an election, the recorder took on himſelf to proceed without the mayor; it came before this court, and the election was ſet aſide. The objection is nugatory, that he may evaſively abſent himſelf, and lay claim to the nomination: There are compulſive powers, and penal inforcements, in this caſe; and the claim of nomination would be of no effect, if unduly ſet up. 'Tis abſurd, to ſuppoſe ſuch ignorance in the viſitor, having magnified, for reaſons, the collegiate juriſdiction, that he ſhould not diſtinguiſh ſuch a caſe. That the conſtruction of *præmonitio*, that they ſhould not elect when the maſter was taking a ride, but wait till the ride was over, as the ſenſe of *expectatus fuerit*, ſeemed ſet up for joke, but was ſeriouſly uſed.

The maſter, though perceiving no doubt, as was avowed, his preſence would have no influence, yet ſignified his intention. They would not however allow him the mere feather of admiſſion. The bells ſet a ringing by way of triumph; though that was regularly to be at the arrival of the viſitor, when the election was concluded; the maſter called on, by way of inſult ſure, when he was to be a mere cypher. He was not to come among them in their hours of exultation, amidſt the ringing of the bells, to announce the joyful tidings; and give any painter that might be in town, an occaſion of deſcribing the happieſt man in the world, a fellow newly elected. All this was to be nothing to him; when they were ſubſided into their monaſtic ſadneſs, then he was bound to partake in it; their ſcenes of feſtivity he was baniſhed from, though his known humanity muſt have been delighted with the ſight.

Three days before the time appointed by Dr. *Marriet*, they thought fit to elect; not that they thought they were bound to employ all the time from whence the election might commence, in the duties of electing; for they did not.

They ſay the ſolemnities of the law might be omitted, and the *præmonitio* therefore of an abſent maſter not neceſſary. Did the founder mean ſo? No. He is to be waited for, ſays the founder. But who ſay, they, is to admoniſh, or to give warning? The ſenior fellow, or the whole body, as their own ſenſe of the matter is. Suppoſing they imagined their election valid without the maſter, for a moment ſuppoſe it to be ſo; why not, at leaſt, wait for the admiſſion by the maſter? which could not affect their right of election, and is not worth inſiſting on by Dr. *Marriet*, without eſtabliſhing the material right of election. I hope, the fellows, having ſworn obedience to the maſter, will not think it at leaſt unreaſonable, to be obliged by a judicial deciſion to the performance of their oaths: An obedience ſo fit and becoming, that, I think, I may venture to affirm no gentleman would refuſe, but from the prejudice of trifling quarrels. They, indeed, on their part, and I for my client, whether as to judges authoriſed by the law to determine the cauſe, or arbitrators choſen by conſent of both parties, have ſubmitted the matter in queſtion to this court. Let them not, therefore, having brought their cauſe hither, aſſert a ſuppoſed power to wait for their viſitor, whom neither we nor they know, and of whom no traces are diſcovered for theſe three hundred years that I can make out. In the mean while, inſtead of any attention to the profeſſion of the law, it might be a muſic college, a college for rope-dancers, according to the various genius of their members, till the *Jews* are pleaſed to be convinced of a *Meſſiah* having come. 'Tis exactly the ſame caſe, as where the viſitatorial power, and that of the maſter coincided; and therefore on diſpute, a reference was neceſſary to this court. In Sir *John Strange*'s Reports, *The King* againſt *Bentley*, it was determined, as there was no viſitor for the body of the univerſity, the judgment belonged to this court.

Why are we to examine concerning a non-entity?

On an information on the 9th of Queen *Ann*, mayors and other officers, will take in maſter of a college as head of a lay-corporation, the fellows are as aldermen; and therefore come within the deſcription. This was denied, becauſe they are ſaid to be officers of a corporation in cities or towns; and are thus contradiſtinguiſhed by the locality. How contradiſtinguiſhed? They uſe the largeſt deſcription—*or other place*: Has *Trinity-Hall* no locality? We are warranted to ſay, therefore, this place is a corporation, is ſubject to the juriſdiction of this court. A *mandamus* has not been unuſual, but otherwiſe: It has not been applied for before in the inſtance of an univerſity, for a reaſon which I am ſolicitious to maintain, for the credit of the univerſity; no other college, nor that before, has been in the ſtate in which *Trinity-Hall* now is. If a man is improperly kept out, this court will ſee that he be put in; if improperly put in, that he be put out. I think, this power will not be eaſily diſputed.

Mr. *Davenport*—The queſtion before the court, in the caſe of *The King* v. *Corporation of Hertford*, quoted by Mr. *Dunning*, was only to determine whether a miſdemeanor, battery or treſpaſs. With reſpect to *Wincheſter College*, as the warden, being biſhop of *Cheſter*, was alſo viſitor, they were obliged to have recourſe to the King's juriſdiction, becauſe the maſter could not viſit himſelf.

Mr. *Dunning* continued—It has been ſaid to the merits of the cauſe, it were better to ſuffer an injuſtice from irregular proceedings on their part, than the inconvenience which they ſaid would ariſe from the court's interfering. What the inconvenience from the interpoſition of the court can be, to prevent irregularities and undue elections, which here is no other power to prevent, if they happen in this college. 'Tis ſaid, *præmonition* muſt have been when the maſter was abſent; for, to what purpoſe when he was preſent? They might have found, if they had gone to 1698, inſtead of 1699, that a proteſt was made, and by the ſenior fellow, againſt elections in abſence of the maſter. And in 1691, a decree, when the majority of the fellows were agreed, that they ſhould have waited for the maſter. The election, by the ſtatute and their own confeſſion, was not neceſſary, nor could be without the maſter's preſence, if he choſe to come in eighteen days after the tenth: After which, if no election is made, within thoſe eighteen days, the election devolves to the maſter. They anticipated it four days. I ſubmit the election is void, for want of the preſence of the maſter; and for want of admiſſion by the maſter.

Lord Chief Juſtice—This is an application by Dr. *Marriet*, maſter of *Trinity-Hall*, which is a college in *Cambridge*, that an information may be entered in the nature of a *quo warranto*, againſt a Mr. *Gregory*; who, he complains, has uſurped a fellowſhip of that college. It has been objected, that there being no heirs to the viſitor, it eſcheats to the King; who waives it. It might have been objected, this is an eleemoſinary foundation; and therefore, goes to the King in Chancery. But this is not upon a caſe of charity, but of a lay-foundation; and therefore the caſe comes before the King in this court.

In the *Wincheſter* caſe, it was held a ſuſpenſion while the wardenſhip and viſitation coincided; and that ſo long this court had juriſdiction.

In the act 19 *G.* 2. there is a proviſion inſerted, that in caſe a diſpute ſhould ariſe about the election of a maſter or fellows, it ſhould not be referred to the viſitatorial power of the King, but to the King here: And judgment muſt certainly be according to the ſtatutes of the place. An objection has been raiſed, that an information in the nature of a *quo warranto* will not lie in this court, nor can be filed by the coroner of this court; but by the attorney-general, who may chooſe whether he will file or no, as it does not come within the 9th of Queen *Ann*. But it has been, I think, truly aſſerted, ſuch information exiſted before the 9th of Queen *Ann*; and if ſo, it is not taken away. It may become very material to perſons as poſſeſſed of franchiſes. It was very right in counſel on both ſides to enter into the merits of the cauſe; that the court, who is obliged to find a remedy, if that on information would not do, might not be compelled to find one. If Dr. *Marriet* were ſo diſpoſed, he might nominate another to be fellow, as by lapſe: But it has been dropt by counſel, that Dr. *Marriet* has no objection to Mr. *Gregory*, and would not be willing to ſet up a perſon who would be entitled to try the right; though thinking himſelf injured. The maſter could not have a right to appoint the day; for then the *præmonitio* would have been abſurd. After the ten days, and not before, they are to meet, and then may proceed to election within the term allowed.

The maſter gives notice in this caſe, in theſe words—"I cannot poſſibly, by reaſon of my health, go on before the 8th of *November*, and therefore appoint that day; and if I don't come down, you may go on the day after:" On which it's obſervable, on the Doctor's own conſtruction of the ſtatute, he appointed after the lapſe of the term; for he ſays, the twenty-eight days include the ten from the firſt day of term; it therefore expired on the 7th of *November:* And the fellows might well be unwilling to ſubject themſelves to a three or four years litigation. As to admiſſion, the abſence of the maſter is to anſwer for it. The ſtatute expreſsly ſays, "the maſter ſhall not lie one night out of college without leave." I am ſorry they have interpreted, by giving a beneficial conſtruction, as they do, that the maſter and fellows are to lay every night out of college. I hope it will not extend to compel reſidence, as it has been underſtood otherwiſe ſo many years; but, in this reſpect, his abſence precludes him. It appears to me, the admiſſion, as ſet forth in the affidavit by the ſenior fellow, is ſufficient; and that Dr. *Gregory* is ſufficiently elected.

Mr. Juſtice *Aſton*—It is very material, to conſider in what manner the exerciſe ſhould be of an information, in the nature of a *quo warranto*.

The precedents are in the name of the attorney-general; but a great number have been found, 'tis aſſerted, on a late ſearch, filed by the coroner of this court.

Rule diſcharged.

Bail.

EXCEPTION againſt three offered for bail inſtead of two: Not allowed. I ſuppoſe, becauſe notice was given of all to juſtify; ſo that the plaintiff might have taken them or any he pleaſed: For notice, that *A. B. C.* or two of them, will juſtify, is bad; as appears by the opinion of the court in another caſe.

Irregularity.

ON a motion to ſet aſide proceedings for irregularity: The irregularity complained of was, the proceſs being ſerved on the ſheriff of *Middleſex*, when it ſhould have been *London.*

It proved to be a miſtake of the perſon who ſerved the proceſs, as to the ſituation of the premiſſes; which were on the right ſide of *Chancery-lane*, and all the houſes on that ſide he conceived to be in *Middleſex*; as it ſeems, indeed, they are, except one or two. They ſuffered the plaintiff to go on, without notice of the irregularity, till the day before he might have ſigned his judgment.

Rule to ſet aſide the proceedings, but without coſts.

Goodlight *againſt* Bridge.

Confidence between Client and Attorney.

THE court will not permit an attorney to alledge, his client has declared before action brought, he will waive a forfeiture on which he ſupports his action.

Anonymous.

ON a verdict againſt a man, for having in his poſſeſſion a piece of old copper markt with the broad arrow. Motion to mitigate the fine; but it was not conceived within the judges authority by the ſtatute. The man appeared ſimple, and really ignorant of the meaning of the mark. Affidavit that he was not worth above 30*l.* clear.

Judgment, with a fine of 40*s.*

Abatement.

WHEN a woman is ſued as feme-ſole, and between the original proceſs and appearance, marries, the action ſhall not abate on a writ of error; and to this, *King* v. *Jones* (Lord *Raymond*) was cited.—Therefore, to reverſe judgment or abate the action, the plea muſt be on a writ of error, that ſhe was, at the time of ſuing out the original writ, and ſtill is, a feme-covert.

Baxter *againſt* The Corporation of Shrewſbury.

ON a motion for a new trial, as on a verdict againſt evidence; the jury having found a cuſtomary right for perſons born in the place to be admitted, paying 5*l.*

The court, particularly Juſtice *Aſton*, ſeemed to doubt the exiſtence of ſuch a bye-law; and it ſtood over. And afterwards, in the ſame term, Lord *Mansfield* delivered his opinion thus——

We all think this a matter of great importance, to come to a ſolemn determination; though by what courſe requires to be deliberately reſolved.

If the 5 *l.* fine be only a bye-law, it might be repealed; if uſage, not. The jury indeed found it an uſage, but new evidence has ariſen ſince.

Whether it extends generally, or no, is a point of very weighty diſcuſſion. The largeneſs of the fine is difficult to be accounted for; but my brother *Aſton* has mentioned toll, and other pecuniary advantages, which may be a good cauſe why the freemen of *Shrewſbury* ſhould be ſubject to ſo large an one.

We think the rule ought to be diſcharged.

Appearance to Judgment.

ON a motion of Mr. *Gould*, to diſpenſe with the perſonal appearance of certain delinquents to receive judgment:

It appeared they were overſeers, and had diſpoſſeſſed a poor woman out of a little cottage where her father had lived fifty years, on an apprehenſion that ſhe would marry, and thereby gain a ſettlement. The woman was wandering without an houſe, and her cottage had been deſtroyed in the night.

Lord *Mansfield*—The court ſuſpends the rule for commanding or diſpenſing their perſonal appearance, 'till it be known whether the overſeers will rebuild the houſe, at the expence computed of 20 *l.* and pay the expence of journies and time ſet by the court. If they fail of ſo doing, it is likely to turn out much more.

Seale *againſt* Hunter.

To ſet aſide a Verdict for exceſſive Damages.

ON an action for damages for the value of a greyhound, the plaintiff laid his damages at 20 *l.* The jury by their verdict gave 80 *l.* and one of the jurors ſaid, he would not get off the bed on which he then threw himſelf, till they gave 500 *l.* Motion to ſet aſide the verdict, as exceeding the damages laid by the plaintiff in his declaration.

It appearing to the court that the verdict did exceed, and that the jury had taken into conſideration abuſive words ſpoken, as if the action had been, *& alia enormia*, the verdict was ſet aſide.

King *againſt* Badford.

ON an information for ſuffering and exerciſing within his houſe billiards and other unlawful games.

The man was not ſummoned, the games not expreſſed, except billiards, which were laid as againſt the 30 *G.* 2. which was held not to extend, except to perſons under particular deſcriptions; and billiards were not taken to be within any other act except, perhaps, 33 *H.* 8. which inflicts different penalties from what were intended by the information, and ſubjects the offender to the cognizance of a different juriſdiction.

Rule to ſhew cauſe quaſhed.

Bail.

IF rule be to put in bail within four days, and bail be put in after the four days, and before motion for attachment, it ſeems good. *Sed Qu.*

Bail in Felony.

ON return to an *habeas corpus*, priſoners were brought before the court, on ſuſpicion of ſtealing feloniouſly a large quantity of cotton.

It was pleaded, that the commitment being on ſuſpicion, and proprietors in the linen trade commonly, on account of the great loſs ſuſtained, charging the whole ſtock, there was no ground ſufficient to ſuppoſe felony on acount of quantity; and therefore, that they be admitted to bail.

1ſt *Objection.* That they may take their trial in five days at the ſeſſions; and that the priſoners got into their hands a large quantity, under pretence of printing, but took out the marks. Therefore the intent made them guilty of ſtealing *ab initio*; as in an horſe taken from the owner under pretence of trying his paces.

2d *Objection*. To three of the bail, ſix being offered, and that they muſt give four bail; and Mr. *Bearcroft* ſaid, that when more was offered than the law will require, as four are required in the caſe of felony, they muſt be able to juſtify all.

Court—No ſuch rule.

3d *Objection*. In the caſe of felony, leſs than four are never taken.

The court denies.

4th *Objection*. Againſt the bail; notice of ſix, and three allowed; one of whom does not appear.

Court agreed not to admit bail, unleſs the third appeared; and obſerved, that it is an exception againſt the perſon offering bail, to have ſo many excepted: One was received at laſt, of thoſe excepted.

The proſecutor conſents that they ſtay in *Tothill-fields*, on condition, that they be delivered up on notice.

Trinity Term,

12 Geo. 3. 1772. K. B.

Barker *againſt* Freeman.

On Conſtruction of a Deed.

LIMITATION to ſupport an eſtate tail, ran in the following terms——

Eſtate for ninety-nine years, if the tenant ſhould ſo long live; and after his death to truſtees, to preſerve contingent remainders during his life.

Argued, That this limitation being repugnant, the ſubſequent eſtates were all void. That the deſign of the ſettler could not be known; that it was more than obſcure and untechnical, it was unintelligible, nonſenſical, and impracticable; and an utter contradiction. The ſettler was maſter of the queſtion, and has ſaid, the eſtate of the truſtees ſhall not commence during his life, but after his death. An eſtate for ninety-nine years, is not an eſtate for life: So that the remainder is void at it's creation, for want of particular eſtate to ſupport; for it is not to commence till after his death. And, in conſtruction of law, his life may out ſtand the term, and then there will be no eſtate out of which the remainder can ſpring; for it cannot veſt during his life, he has expreſſed the contrary; and after his death it cannot, becauſe the particular eſtate is ſhort of an eſtate for life.

In the caſe of *Dormer* v. *Forteſcue*, 1762, in the Houſe of Lords. ——Limitation of an eſtate to *John Dormer*, and his heirs; and if he died without iſſue, to *Robert Dormer* for ninety-nine years. And on his death, or ſooner expiration of the term, to the truſtees named, to preſerve contingent remainders during life. The ſame incongruity was alledged: And had it not been for the words "or ſoon-

“ er expiration of the term,” would have been a caſe in point. An eſtate for life, to commence after death, is void: But the expiration of the term might have happened by effluxion, forfeiture, or various ways. Therefore, if it was then determined thoſe words only, “ or ſooner,” &c. made it good, it appears an expreſs determination in favour of the preſent objection. As to the doctrine of rejecting inſenſible words; it cannot be diſputed, they may reject, or more properly diſregard, inſenſible words; that is words, I ſuppoſe, that cannot be underſtood. Words are not inſenſible that are contrary to other words in an inſtrument, but very operative; they make it effectually void.

Serjeant *Glynn*, on the other ſide—This is a point which your lordſhips left open, having decided the reſt; and is, whether an eſtate of freehold paſſed to the truſtees to preſerve contingent remainders, or not. In which laſt caſe, the whole intent fails of all parties. We contend it to be a remainder to the truſtees of an eſtate of freehold, an eſtate for years only between; which being a chattel intereſt, the freehold, having nothing elſe between, commenced immediately to the truſtees.

The very part to which your lordſhips apply your attention at preſent, proves the intent, that the truſtees muſt take immediately on ſurrender, forfeiture, or other accidental lapſe of the term, before death of the tenant for years.

The true method of conſtruing, we ſubmit, is—rejecting the words “ after the deceaſe,” or ſupplying other words, “ or ſooner “ expiration,” &c. It is ſaid, there's no pretence nor precedent on the books, for rejecting any words not merely inſenſible. In Lord *Coke*, an eſtate to heirs male, without ſaying of his body, makes a good fee-ſimple, rejecting the word “ male.” So in all conditions of a deed, or limitations of a ſettlement, a word not only that defeats, but makes leſs beneficial than the former, is always, by the conſtant courſe of the conſtruction of law, rejected.

In this caſe, if we do not reject the words contended for, a ſettlement in conſideration of marriage will be totally defeated.

Conſidered as a common condition, it ſhall be taken beneficially to the grantee; that is, in the import of it to the truſtees; but it is objected, why ſhould we not reject words repugnant, on one ſide as well as on the other? And then the whole intent would periſh to the parties on both ſides; contrary to the maxim, *ut res magis valeat quam pereat*; ſo by the mere dry rule of conſtruction, we muſt reject in favour of the grantee. They ſay, rejection would be inſufficient; but we muſt ſupply, I muſt ſay, by implication of law. I ſubmit, the words “ or ſooner expiration” might be underſtood. It was held in *Dormer* v. *Forteſcue*, they might, even ſuppoſing they were not taken as inſerted, and that the inſertion was principally for the benefit of thoſe who were to take advantage of forfeiture. I hope, therefore, your lordſhips will adjudge the eſtate to be veſted in the truſtees, and that the plaintiff ſhall recover.

Mr. *Dunning*—I never underſtood, that every deed was abſolutely indefeazible. It ſeems, the intention is all in all; and once find out that, all expreſſion is ſuperfluous, and no repugnancy of words can cover the intention, but that it will appear with ſufficient certainty and effect. I never did underſtand ſuch an extent of conſtruction was or could be allowed. If the intention be diſcovered to preſerve contingent remainders; if he had only named the perſons he meant to take in ſucceſſion, without appointing limitations or aſcertaining the eſtate to paſs, and was to ſay only "'tis my "intent that contingent remainders be preſerved," the court will make the limitations, aſcertain the quantity and quality of the eſtate; and, on this ſingle hint, frame and execute for him, a complete will. Is an eſtate, then, in *futuro*, to be made one to commence immediately; an eſtate for years, to be made a freehold; an eſtate for life, a fee-ſimple! (All theſe are new principles, poſitively aſſerted.) What would not be the confuſion? All the language of the law, all the technical terms inſiſted on in ſuch numbers of caſes, all vaniſh: All were argued (if intention is enough) by ignorant men, and determined by ignorant judges. It ſeems to ſtrike at the foundations of all law. I have often heard, one only ill deciſion is productive of more miſchief than can poſſibly be compenſated by any good to individuals: But it ſeems we muſt ſeek from authority, what can't be had from argument. In the determination of the caſe which has been diſputed between us, which my learned friend aſſerts, impowers the court to alter and inſert, and reject generally, the opinion is, we cannot alter words in the deed; we cannot inſert words, but we may reject words merely inſenſible. If there is room for two conſtructions, equally legal, then, I underſtand, the court may chooſe that which anſwers the intent, *ut res magis valeat*. It is a great deal more, that the court is required to do here, than the court ever granted to a will: It defeats the favourite ſucceſſion of the law, by taking it from the heir at law. Even if a teſtator ſays, "I mean to diſinherit my heir at law; he's a raſcal, "and ſhall never have a ſixpence of my money;" if he limits it no where elſe, it goes to the heir: And I hope this will be the laſt of the laws of *England* which ſhall be over-turned.

Lord *Mansfield*. After reciting the deed, concluding with limitations in tail to the firſt and every other ſon, his lordſhip proceeded to judgment upon the point particularly in queſtion.

The intent of the parties depends on this, whether there is a good eſtate of freehold, to ſupport the limitation to the firſt and every other ſon.

There is no reſulting uſe in the grantor; nor ſpringing uſe, as in an executory deviſe, to the truſtees. The difference of favour between a will and a deed, is, as to technical terms of limitation, which are required in a deed, but may be diſpenſed with in a will: But intent (as in Lord Chief Juſtice *Willes*'s opinion) muſt be equally preſerved. This contradiction leaves no doubt of the intent, it being on a valuable conſideration for a ſettlement to iſſue. The great opinion in the Lords went againſt the ſtrict, technical, verbal terms. The limitation is not after death there, ſimply, but the end or ſooner determination. Where there are any parts to ſhew intention, the courts muſt lay hold of them; as, "or other ſooner," *&c.* But as theſe words would have overturned the latter branch, (for it's a limitation to the firſt and every other ſon living; the anceſtor's was an eſtate interpoſed, without freehold to ſupport it) therefore they rejected the words "after deceaſe," as inſenſible; though, certainly, they are words not without an operative meaning.

The limitation is to prevent the father, with conſent of the ſon, from barring the remainders without the truſtees: Are not, here, the words "after his deceaſe," followed by "to preſerve contingent remainders during his life," inſenſible?

Therefore, I am of opinion, either "after deceaſe" ſhould be rejected, or "other ſooner determination" be ſupplied: And this will be no rule, when intent can't be made out from the body of the deed.

Bail.

NOT admiſſible, on account of effects abroad.

Award.

MOTION to ſet aſide an award, for that the arbitrator had awarded coſts of arbitration, without ſpecial authority for ſo doing.

Mr. *Mansfield* argued, That arbitrators, without ſpecial authority, have no ſuch power.

Mr. *Dunning*—This is not a ſpecial arbitration, but a general one under the act, to determine all differences, and do complete juſtice between the parties; the coſts of the action and arbitration, as well as the debt, have been given by the arbitrators againſt the defendant in this caſe; becauſe, in their judgment, the defendant ſhould never have litigated.

Mr. *Mansfield*—I conceive, the power of the arbitrators is to decide differences between the parties at the time of ſubmiſſion; and, beſides, there is the great inconſiſtency of it's being ſaid that coſts ſhall not be paid, and yet they tax coſts.

Mr. *Dunning*—Suppoſing the debt 100*l.* and the coſts 5*l.* and 105*l.* coſts given; then they ſay they will give no coſts; that is, having included the coſts in the full ſum, they add, for fear of miſtake, the coſts ſhall not be paid beſides.

Lord *Mansfield*—It only appears an inaccuracy in the wording; but I ſee no reaſon to ſet aſide the award on it.

Mr. *Mansfield*—If your lordſhip thinks the award may be ſubſtantiated in the reſt, the coſts of the arbitration, at leaſt, will not be good.

Lord *Mansfield*—'Tis a very nice diſtinction: It does not appear upon the face of the award; if it had, you might legally have taken avail.

Mr. Juſtice *Aſton* [I think] of the ſame opinion.

Mr. *Cowper*—In the caſe of *Giles* v. *Underwood*, coſts of the reference were not allowed to be diſcharged; it not appearing upon the face of the award.

Lord *Mansfield*—The caſe cited by Mr. *Cowper* is in point.

Let the rule be diſcharged.

Gregory *againſt* Onſlow.

ON a motion for an attachment for contempt, in reſiſting the ſheriff of *Shrewſbury*, on an arreſt for debt.

On the plaintiff's affidavit, it appeared, that they were aſſaulted in attempting to execute the warrant, and one had his arm beaten to a jelly; and that the defendant *Onſlow* took from them the King's warrant; and that they got away the defendant by force, from the hands of legal proceſs.

Mr. *Bearcroft*—That, if true, the ſheriff might and ought to have returned a reſcue; that they had behaved violently, and refuſed bail; and that, except the metaphorical injury of being beaten to a jelly, all the harm that had happened was the entanglement of one of their ſpurs in one of the women's petticoats. As for the contempt of the court charged, in ſaying many deriding words, they could not have anſwered more poſitively and preciſely, if they had anſwered to interrogatories. And hoped, therefore, his lordſhip would not think it neceſſary to interpoſe, by the extraordinary aſſiſtance of attachment, but diſcharge the rule without coſts.

Mr. *Dunning*, on the contrary, That the ſheriff had a right to chooſe his remedy, if he thought attachment better than returning a reſcue. That the metaphorical harm was only metaphorically anſwered; for they admit the plaintiff, being a great large man, got a little hurt, but don't believe that his ſide was all a jelly. At leaſt, then, I ſhall gain by an attachment, an eſtimate of the quantity of his ſide that was made jelly. *Onſlow* owns, that being ſtruck at, he gave a blow with a ſhovel at *Gregory*; and ſeems to have relied much on his wife, mother and ſiſter, to facilitate his eſcape. This, my friend ſays, is very natural: I admit it; but I hope he does not think it legal.

As to the objection of not returning a reſcue; they object being treated with great lenity by a proceſs being taken out, where they will have every advantage legally poſſible, inſtead of being concluded by a much ſeverer mode of action.

The contempt of the court will perhaps be better anſwered, when they come to ſwear upon interrogatories, in anſwer to the charge againſt them, before the maſter of this court.

Lord *Mansfield*—There appear faults on both ſides; *Onſlow* confeſſes ſtriking firſt, (how the ſhovel came in does not appear;) and they refuſed bail.

I think it would be improper to proceed on an attachment, as the parties could not anſwer farther.

Let the rule be diſcharged.

Elderton *againſt* Freemantle.

Turner *v.* Schomberg, Strange's Reports.

ON a promiſſory note for a debt contracted by an inſolvent debtor before his diſcharge, given to a truſtee for the benefit of the creditor.

Mr. *Hammond*—An inſolvent debtor, before he went to priſon owed 36*l.* he was afterwards diſcharged by the inſolvent act; and then agreed and promiſed to pay, by two guineas a month, the whole ſum; and having thus diſcharged twelve guineas, on his inability to pay more, the creditor came on him to prove a new debt, on a new promiſe: But not allowed.

In the caſe of *Ford* v. *Chilten*, Common Pleas, *Hilary* Term 1772. *Chilten* was an attorney, he was indebted before his diſcharge on this very act of *G.* 3. 1769; he promiſed to pay that debt after his diſcharge; and concluded ignorantly in his count in the action brought againſt him, to the country and not to the court.

Serjeant *Davy* was then counſel; and was held by the court to have ſpoken the very ſenſe of the act. On account of the informality of the plea, he ſaid the defendant was concluded; but that the intention of the act being to relieve inſolvents, was to be taken liberally, largely, and in it's full extent; ſo as to diſcharge the perſon of the debtor of all debts contracted before the act.

The only queſtion here is, the diſcharge of the perſon of the debtor, for the act does not diſcharge the debt; if the debtor is an honeſt man, he will give a written document of the debt, on which the promiſſory note was given to the truſtee, for the benefit of *Elderton* and *Hall*; which truſt the law will recognize, and not take it as a note to a third perſon in extinguiſhment: Nor can it be underſtood otherwiſe than the old debt, with a new promiſe; nor is the debtor to be taken to engage for more than payment, nor that he would ſurrender (or ought) his perſon to be impriſoned.

Judgment for the defendant.

Note. This was on demurrer, and the points on which Mr. *Hammond* argued, were, that the truſt and note to a third perſon, for the benefit of the original creditors, was no extinguiſhment of the debt contracted before the diſcharge, under the inſolvent act, and creation of a new one ſubſequent to the act: And that the perſon of the defendant was not liable, but diſcharged under the inſolvent act. On theſe two points, particularly the ſecond, the court grounded their determination.

Information.

The King *againſt* Wallis and Clarke, Bailiffs or Chief Magiſtrates of Ipſwich in the County of Suffolk, and Others.

ON the information of *Banford*, a coffee-houſe-keeper of *Ipſwich*, for certain miſdemeanors——

Banford alledged, that they had quartered nine ſoldiers on him, and three horſes, for which he had no accommodation.

That *Wallis* had prohibited playing cards at the plaintiff's coffee-houſe; till, on advice, he was informed ſuch amuſements were lawful.

That *Wallis* quartered them out of malice to him; and that he has been a long time 47 *l.* out of pocket.

Stubbing, a brandy-merchant, in ſupport of *Banford*'s affidavit, ſays "that his trade is much diſcouraged; and that his cuſtomers "ſay, they muſt deal with the *Clarkes*, *W.* and *J.* or they ſhall "be ruined by ſoldiers quartered on them."

Another deponent complains, that *Clarke*, on his repreſenting the number of ſoldiers, deſired to ſee the billets, and tore them.

On the other ſide, the counſel for *Wallis* and the *Clarkes*, alledged in their defence, from their affidavits, that *Wallis* being informed of an houſe encouraging gaming, ſent for the perſon, who complained "that it was very hard; for *Banford* had people gaming from morning to night:" That on this, a general order iſſued, to ſuppreſs all thoſe houſes, of which there are many. Afterwards, that going to *Banford*'s, he was very ſcurrilouſly treated by *Banford*'s cuſtomers, for interrupting their play. On which, he ſays, "he diſcouraged "the houſe." That *Banford* came and complained of being over quartered, which *Wallis* denied, for that he could bear it better than moſt others: That he ſound he was encouraged to fly in the face of juſtice, which he would not ſuffer as long as he acted as a magiſtrate; that *Banford* had been ſhamefully favoured, and that he ſhould have his proportion encreaſed now. That he, Mr. *Wallis*, would afterwards have adviſed with all the juſtices, to ſee whether *Banford* was over-quartered; and that *Squire*, an Attorney on the part of *Banford*, ſaid, he did not wiſh to proceed, and was ſatisfied.

As to the charge againſt *Clarke*, of tearing billets, the anſwer given is, that it was to prevent men getting billeted on three or four places at once, and contribution being raiſed accordingly. He denies *Stubbing*'s affidavit, of the cuſtomers of *Stubbing* refuſing to deal but with *Clarke*, on account of billeting ſoldiers: And refers to the regiſter, that *Clarke*'s trade has decreaſed ſince he was a magiſtrate.

It appears, I think, that there are one hundred and ſeven licenſed houſes in *Ipſwich*.

Serjeant *Glynn* was on the ſame ſide with Mr. *Wallace*; and added, that he hoped, the rule againſt the defendants would be diſcharged with coſts.

Mr. *Dunning*, for the informant. That the complaint is very ſerious; that *Wallis* reſented his excluſion from a ſociety, which he purſues now, as very pernicious; that *Wallis* did not uſually billet there before; that the billets were uſually ſigned by one juſtice, but this by two, in which *Wallis*'s name was unneceſſary. That the party in town were Sir *John Mordaunt*'s dragoons, about ſixty men and ninety horſe, that there were at leaſt one hundred and five licenſed houſes in *Ipſwich*; and therefore *Banford* had more by much quartered on him than his due proportion; that the accommodations were not good, by Mr. *Wallis*'s own confeſſion, who ſays, " the houſe derives it's profits, not from the lodgings, but from the " company that comes to play there". That 'tis ſaid, Mr. *Wallis*'s conduct, if irregular and oppreſſive, is the firſt; that 'tis the firſt, is accounted for eaſily. 'Tis admitted, the lodging-rooms are juſt ſufficient for the family only. The argument is, " you have not room " for horſes or ſoldiers now, but you may have both; the long " room you uſe for unlawful games, and from which that profit " ariſes which makes it fit you have ſo many men and horſes, quar" tered on you, divide that, and make part into ſtabling, the other " part for lodging room for the ſoldiers." Mr. *Wallis*, in his affidavit, explains his motive; " You have flown in the face of juſtice; " one of us muſt fall: I will level you, or periſh in the attempt."

As for the application to the juſtices, if any, that it was ſet up for colour to ruin and deſtroy that houſe which alone he wanted to deſtroy.

As to the dropping of the enquiry before the juſtices, it aroſe from Mr. *Stanton*, one of the juſtices, telling him " that their juriſdic" tion extended not to review."

They ſay, they had a deſire of ſuppreſſing the amazing number of theſe houſes: Have they ſuppreſſed many? If they had ſuppreſſed

Banford's

for his ſuppoſed crime, which I am authorized to ſay now is none, their motive would have appeared; if they had ſtruck off more, they would have ſuppreſſed thoſe with whom they had no quarrel. As for *Banford*'s being the beſt houſe in the town, Mr. *Wallis*, the defendant, ſays, it is not ſo in the lodgings, which are allowed but ſufficient for the family; but he infers the profits, from the gaming and extravagance which, he ſays, he ſees is carried on there.

Lord *Mansfield*—When application is made for an information againſt a magiſtrate, for partiality and corruption, the whole caſe ought to be ſtated; for out of the whole the grounds muſt ariſe, on which farther proceedings may be granted or refuſed.

So vexatious a method of enquiry into the conduct of men, expoſed by their office to much miſrepreſentation, as that which omits very material points, and reſts on thoſe only perverted by falſe conſequences which ſerve the proſecution, merits to be diſcountenanced. In the inſtance before us, *Banford* has been guilty of an attempt to impoſe on the court. He ſtates what may look like an intention of overburthening him in *Wallis*, and omits the prior part of the affair. A ſerjeant (it appears, at the coming out of the ſtate) and four men, were ſent to be billeted at *Banford*'s. Though the men were wet; though after a long march, and arrived at night, in very bad weather, (in *November*) he would not admit them to the kitchen fire; but turned them out to ſhift for themſelves as they might be able.

The ſerjeant goes and tells the magiſtrates their orders were not obeyed. In the mean while a great diſturbance enſues, and a perſon who happened to hear it, begs for peace, that ſome care might be taken of the ſoldiers.

Clarke and *Wallis* remove the ſoldiers to the *White Lion* and the *Croſs*. So far were they from malice to *Banford*, that they ſhewed improper favour to him. Afterwards a man comes to the knowledge of *Wallis*, who kept a billiard table; he is ſummoned, confeſſes, and begs that *Banford* and many others may be put down, or otherwiſe he ſhall be ruined. On this the magiſtrates give a general order againſt all the licenſed houſes ſuſpected of exerciſing unlawful games, and at unſeaſonable hours. Very ſcurrilous behaviour paſſes againſt *Wallis* at his coming into *Banford*'s. *Squire* and another attorney tell him they wonder at the impudence and ignorance of the magiſtrates: That they were gentlemen, and had a right to play at what, and in what manner, they pleaſed. 'Tis ſaid, and it appears likely on the face of the affidavits, that an aſſociation has been entered into, to intimidate the magiſtrates, and to ſupport the proſecution.

Some time after, *Banford* has nine ſoldiers and three horſes quartered on him: He goes to Mr. *Wallis*, ſays, he thinks himſelf ill uſed in being burthened by ſo many. *Wallis* anſwers, "I do not "think you are ill uſed; for where the *Lion* and *Croſs* have twelve, "you ought to have eighteen. I was much ſurpriſed to find you "have been ſhamefully excuſed theſe three years, from having any "quartered on you. You have flown in the face of juſtice and the "laws; to which I underſtand you are encouraged by a ſet of diſſipated heroes. While I act as a magiſtrate, be aſſured, I ſhall ſupport juſtice and the laws to my utmoſt: One of us muſt give "way; and I will either make you fall, or periſh in the attempt." Theſe words he uſed, or ſome to the like effect, importing a ſpirited reſolution of maintaining the duty of that authority with which he was entruſted. A violation had been committed by *Banford* of the duty and reſpect he owed to the laws; and it ſeemed but equitable his proportion ſhould be encreaſed, after he had warded the juſt burthen ſo long, and with ſo much contumacy.

Clarke has little particularly againſt him, except his acting with *Wallis*, in quartering the nine ſoldiers and three horſes; (for what is ſaid in the affidavit of *Suſan Groves* deſerves no attention.) It's true, the affidavit ſpeaks, that for not dealing with *Clarke* ſhe had been ſo over-run with ſoldiers that ſhe was forced to quit her buſineſs and habitation; but ſhe denies the truth of that fact, ſays ſhe did deal with him, and that ſhe was not overburthened; and expreſſes great concern, that ſhe was deceived by the affidavit read to her, in ſuch a manner that ſhe could not tell how to underſtand it.

A circumſtance is mentioned, That a man came, who ſaid he thought he had been overburthened; *Clarke* ſays, "I can't help till "the next change of quarters; and then I will relieve you." The other then ſubjoins, "I have ſo little dealings with you, I hardly "know how to aſk you to ſubſcribe to my bowling-green." To which *Clarke* replies, "No matter; I don't do for the trade, but "I don't mind half a guinea: However, if I think of you, think of "me." Is not this referred to the ſubſcription, and the return he thought reaſonable for it in the man's cuſtom? Has it any thing to do with the quartering, and relief from that; which he promiſed before hand, as ſoon as it could be reaſonably done?

I think, therefore, theſe ought to be diſcharged with coſts; and if the anſwer of *J. Clarke*, did not appear ambiguous, together with another circumſtance, I ſhould think the ſame as to him. It appears, on being aſked whether there were not lucrative profits, which inclined him to take the troubleſome and unthankful office of billeting; certainly, ſays he, I confeſs.

He anſwers to the charge of this converſation, that he never acknowledged the taking any lucrative profits.

What has more weight with me is, that a perſon thinking himſelf over-quartered, applied for a removal of two ſoldiers, and two other men, and beſpoke ſome ſpirits; but not liking them, deſired to change, and others were ſent, which he and his companions complained of, and he bought no more; after which the men were ſent back to him again.

I think, therefore, the rule againſt him ought to be diſcharged, without coſts.

Note—In the caſe of *The King* againſt *Badford*, (the *Eaſter* Term precedent) this man had been proceeded againſt on three informations, for ſuffering billiards and other unlawful games. The man not ſummoned; the games not expreſſed, except billiards, which were laid as againſt the 30 *G.* 2. which was held not to extend, except to perſons under particular deſcriptions; and billiards not taken to be within any other act, except (perhaps) the 33 *H.* 8. which inflicts different penalties from what were intended by the information, and ſubjects the offence to the cognizance of a different juriſdiction. This was the caſe to which Mr. *Dunning* alluded; and the grounds of the court were on the irregularity of the proceedings.

Aſſault.

ON an action of aſſault, againſt ſome gentlemen, ſcholars of *Cambridge*, which ſtood for judgment, the court was applied to, in order to obtain leave that their perſonal appearance might be diſpenſed with; for that the aſſault was by miſtake, and the gentlemen were very ſorry.

Lord *Mansfield*—If the gentlemen are concerned, they would be ſorry not to go before the maſter. 'Tis a very great offence, to attack a man in ſuch a manner, under pretence of miſtake. It ſeems as if they went with a determination to beat ſomebody. 'Tis a very great irregularity. If we don't admit the cognizance of the univerſity, we muſt keep the peace in it. Make the rule for the matter to go before the maſter, with coſts.

Note—This aſſault was committed, I think, againſt a perſon reſident in the univerſity, but not matriculated there.

Anonymous.

ON an action of aſſumpſit, againſt a tenant for neglect to repair hedges, &c. the defendant counts, landlord did not aſſign timber for repair, nor was there any proper which he had a right to take.

It was held that this plea was bad, both in form and ſubſtance; for that, 1ſt, Defendant ſaith not, he aſked the landlord to aſſign; which he muſt firſt do, and afterwards, on refuſal, may take without leave.

Next, That by plea " none to which he had a right," he puts on the jury to determine on the matter of law.

Likewiſe, That for laying no venue, the count was bad.

Poſſibilities.

Anonymous.

MORE 176. Caſe of *Whitlocke* v. *Hardinge*, a leaſe by a joint-tenant, of a moiety, to hold after her death for ſixty years, if the other joint-tenant ſhould live ſo long, not good. This caſe was cited, to prove poſſibilities; but *Selwyn* v. *Selwyn*, by Lord *Talbot*, quoted to the contrary. But the court ſaid, this was a caſe of veſted executory intereſts. *Clarke* v. *Clarke*, 2 *Vern.* 223. was quoted. The court ſeemed to think, under circumſtances, a poſſibility aſſignable, though in general, as a choſe in action, not aſſignable.

V. 2 Blackſtone 290.

The King *againſt* Hill.

ON an information in the nature of a *quo warranto*, to ſhew cauſe why he exerciſed the office of burgeſs of the borough of *Saltaſh*——

Lord *Mansfield*—In 1757, an election was began; and adjourned, for a riot, to the 17th of *September*. 'Tis remarkable, that in the affidavit, Mr. *Mayo* complains of the delay deſigned to his prejudice, and declares himſelf elected duly; however *Hill*, was *de facto* elect. In 1759, to quiet diſputes, both reſign. The difference in the terms of renunciation is remarkable: *Mayo* reſigns all claim; *Hill* his office. *Hill* immediately re-elected. The dilemma ſeemed good, on mature conſideration, that the day, if good for the renunciation of *Hill*, was good for his re-election. Nothing has been ſtated in proof of a proceeding to poll in favour of *Mayo* the firſt day; if there had, ſomething might have been; though in the abſence of a returning officer, on account of a riot happening, there is no precedent of an election being held good. The only objection to the election, then, of *Hill*, muſt have been want of ſummons. The court cannot take that up without any ſuggeſtion of it from the parties; nor preſume, after fifteen years acquieſcence. Therefore we are all agreed, the rule muſt be diſcharged.

Rex *againſt* Metcalf, Eyanſon, and Others.

To enlarge Judgment on a Riot.

THE court will not give judgment ſeparately, when two defendants are concluded in the ſame action; unleſs cauſe can be ſhewn, why there's no chance of the appearance of one. But allowed that the others, againſt whom verdict had paſſed, and who were in *Yorkſhire*, indigent people and miners, need not be waited for.

Metcalf and *Eyanſon* had a farther day to appear; after which they were ordered to go before the maſter.

For a Rule to ſhew Cauſe againſt W. Eſq. Juſtice of the Peace.

WHY an information ſhould not go againſt him, for not, in purſuance to an act of parliament, (the 19th *G.* 2.) paying in the poor's money raiſed by a fine, on certain perſons convicted of profane ſwearing; and not returning the record of the conviction. Rule granted for enquiry of the juſtice; no notice having been yet given him, that a motion would be for an information.

King *againſt* Waller.

ON a motion, to ſhew cauſe why an order of juſtices of the peace, for removing the defendant from his office of clerk of the peace of *Middleſex*, ſhould not be quaſhed——

Mr. *Wallace*—The act of parliament gives abſolute power, without appeal to the juſtices of peace, to remove or ſuſpend any clerk of the peace, for any miſdemeanor in the execution of his office.

In this caſe the charge is in writing, according to the act, and has five articles.

1ſt. Negligence; in drawing ſummary indictments, which have afterwards proved defective.

2d. Neither attending at ſeſſions himſelf, nor providing a ſufficient deputy.

3dly. Entruſting the records of the quarter-ſeſſions to a man's keeping in another county, whereby they could not be found.

4thly. Not attending, as his office requires, at the laſt general quarter-ſeſſions, nor providing any to attend.

5thly. For taking extortiouſly, by colour of his office, the ſum of 10*s.* 4*d.* of a certain perſon named in the charge, upon the commitment of a perſon for felony likewiſe named in the charge.

Of all, each and every of the miſdemeanors, ſeverally charged to every one of the articles, they find him guilty, and diſcharge him.

The matter in plea, in ſupport of the rule, has been given, that ſome articles of the charge are defective. I affirm, that every one of the articles would have been good; I think, in an indictment: But the laſt would have been ſufficient of itſelf, even without the act, at common law.

However, it's competent to the ſole diſcretion of the juſtices, whom the legiſlature have entruſted in this inſtance with the ſole power to remove or ſuſpend as they ſee fit, on the proving any ſingle miſdeameanor in the execution of office; if there be, admitting it, for the queſtion ſake, a defective or inſufficient article in the charge, it will not affect the reſt, nor can the order of the juſtices be ſet aſide.

Mr. *Dunning*, to the ſame effect. Concluding, that he hopes what articles can, may ſtand; and what cannot, will be not entered, if the court be ſatisfied of the ſufficiency of any one, for the obvious reaſon, That clerks of the peace will, to the full extent of their power be tempted to tranſgreſs or be negligent.

Mr. *Eyre*, Recorder—My lord, I am not clear that the gentlemen on the other ſide will find it eaſy to prove any of the articles not ſufficient, as charged, for miſdemeanors. The quarter-ſeſſions is judge as to the miſdemeanors both of law and fact. The analogy is much greater between this caſe and an indictment, than an action on words; where, if a jury find their verdict on words, ſome of which are actionable, and ſome others not, (*vide* the caſe in

Lord

Lord *Raym.* 886.) the whole is void, becauſe the damages go upon the whole; but here each cauſe aſſigned ſtands diſtinctly as a cauſe of removal.

If it ſhould be ſaid, greater tenderneſs ſhould be uſed, becauſe the perſon removed loſes his freehold: He took it ſubject to the conditions of the act; there was no freehold in the office before the act; but he was removable by the *cuſtos rotulorum* at pleaſure.

Long before the making of the act in, *Cro. Car.* 436. negligence in a deputy, was ſufficient to deprive of office by common law.

2 *Lev.* 71. *King* v. *Lady Broughton*, in eſcape; ſhe having an office for life, as warden.

Negligence of her deputy permitting the eſcape, was a forfeiture of her freehold in the office, and ſubject to a fine. As to the charges—There's one indictment, without any addition; another of murder, without it's being drawn with the words " feloniouſly, " and of malice forethought." The records are of admiſſions of magiſtrates, whereby to prove their title to hold office. The other articles are ſufficiently clear, allowed, and ſtrong; and, as I apprehend, every one of them miſdemeanors.

Mr. *Lane*—I am of the ſame ſide. The charge of drawing defective indictments may be thought a fault of the head only; however, it will not be queſtioned, I ſuppoſe, to be a miſdemeanor. If here had been two or three it might be thought hard: But the inſtances are ſelected out of a great number.

The charge of not employing proper perſons is of the ſame kind. I need not ſpeak to the charge of extortion.

The fifth charge, of not attending by himſelf or ſufficient deputy, I find, was taken ambiguouſly: But it's founded on the act of parliament expreſsly.

Mr. *Cox* began for *Waller*, but was deſired to plead it the next day.

Mr. *Cox*, for the defendant—As we are to argue on an order made by the juſtices, for the removal of Mr. *Waller* from his office, much has been ſaid what the juſtices may do: But I chooſe to argue on what they have done. I except againſt the mode of puniſhment they have taken upon themſelves to inflict. The act gives power, on a charge in writing, to remove for any miſdemeanor. The word miſdemeanor is a word of law: And therefore is to be taken

Vide 4 Blackſtone, c. 1. p. 5. 8vo. Ed.

notice of by your lordſhips; who will ſee, whether by law the offences charged come under that denomination; in which, I apprehend, is always contained ſome degree of guilt. The act has given great latitude of power: An hour's ſuſpenſion, or an abſolute removal for ever. I apprehend, that the legiſlature intended, by ſaying, as the act does, from time to time, that directly on a miſdemeanor, without waiting to accumulate a great number of charges of different degrees and different times; and then exerciſe, at once, the full extent of their juriſdiction.

They recite, that whereas *Waller*, clerk of the peace, *&c.* has been guilty of all the miſdemeanors, we do order that he be for ever removed from his ſaid office.

It would be apparent in common parlance, that if it had been aſked, why did you puniſh him ſo ſeverely? the anſwer had followed, that for the number of miſdemeanors contained in the charge, we think fit to exerciſe our full authority. If any of the acts charged as miſdemeanors, be not, it ſeems clear that the puniſhment will be diſallowed; the order having been made on offences of inferior degree, and ſuch as reach not to that degree on which the order of removal muſt be grounded. I repeat, miſdemeanor is a term of law, and which your lordſhips will therefore take notice of. A poor boy, *Charles Pleaſant*, having received ſentence before Sir *John Fielding*, for tranſportation for a fraud, for that he had paſſed a note which was falſe, the cauſe was removed hither; and the court was clearly of opinion, no fraud. [I ſuppoſe, becauſe the boy was found ignorant of the note's being bad.]

As to the drawing of indictments, five are ſeverally charged under one head; ſo that five miſdemeanors are to be proved under that head:

1ſt. It's not the office of the clerk of the peace, who is only to return the records of indictments perfect into the court. Next, the legiſlature expreſsly calls the falſe drawing of indictments, miſtakes; and therefore not miſdemeanors. It may be ſaid, the number will make the caſe worſe: Five hundred are charged. I have nothing to do with matter out of record, five only are ſtated. In an indictment of bigamy it's drawn againſt the peace of our Lord the King, when the offence was in the laſt reign; and whether the offence did not continue, has been long matter of ſerious diſcuſſion by men of very conſiderable abilites.

In that of murder, feloniouſly, *&c.* are omitted. It may be neglect; I ſubmit, it's nothing worſe. And the record takes no notice that the indictment was not drawn again; and therefore it will be taken of courſe for the defendant. In that of burglary, the offence is charged, that he drew "*A.* broke into the houſe," without ſaying "entered." Who can ſay, his inſtructions were not ſo? Addition was not inſerted: There's no damage proved to the public; it's not pretended the party did not come to his trial. If within three years they find five out of about two thouſand four hundred indictments, Mr. *Waller* deſerves commendation, for his aſtoniſhing accuracy in making ſo few errors. For the charge which accuſes him of not attending, nor providing ſufficient deputy: Beſides that it does not ſpeak to times, it does not ſay that ſome friend did not provide one for him. With reſpect to the ſeven records removed, (if they deſerve that ſacred name of records,) nothing of that nature can be more inſignificant: 'Tis not maintained, 'tis his buſineſs to keep the records in the county. I know not that it is a miſdemeanor; but, admitting it to be ſo, the charge contradicts itſelf. They don't directly charge his taking the records out of the county; it ſays, he took ſeven; they proceed to add, they were kept out of the county by Mr. *Waller*, and that ſo negligently, that they could not come at them: And yet theſe very perſons, Mr. *Waller*'s enemies, bring all the ſeven into court. They ſay they were kept out of the county for twelve years; when 'tis admitted, on all hands, Mr. *Waller* has been in the office only eight. To the laſt, I anſwer; to the ſecond, it's too indefinite to admit of any defence, or to convey the leaſt ſhadow of certainty, what ſort of crime is intended. I hope your lordſhips will, therefore, not ſuffer ſo vague, accumulated, and, I preſume to ſay, illegal a charge, to eſtabliſh ſo ſevere and irretrievable a penalty on the unhappy object of it's attack.

Mr. *Manſfield*, to the ſame effect. Towards the end—The charge of miſdemeanor by extortion, the only charge on the record which I take to be legal, is a charge containing ſo different degrees as to the oppreſſion on the party, and more general injury to the public, that of all charges, it ſhould leaſt have reſted, with all it's ornamental expatiations, on intendment or ſuppoſition: However, if one of all the articles of accuſation be inſufficient, the whole, I apprehend, will be vitiated. Though there are many *dictums*, that orders are to be beneficially conſtrued, I underſtand them as to the form, is to the ſubſtantial part; I take it, they muſt reſt upon the ſame ground as convictions do. Though there's an inſtance in *Strange*, which would aſtoniſh one, if one did not know the jealouſy entertained of the conduct of inferior courts: An order to remove a pauper; the order was quaſhed, becauſe it's ſaid to be made in a ſeſſions held on an adjournment, without ſtating, that the ſeſſions was held within the ſtatutable time after which the adjournment was duly made. As ſuch a power, by the ſtatute under which the juſtices were empowered to act, is entruſted to the juſtices, as I know no other inſtances of in that magiſtracy, I truſt intendment and ſuppoſition, and an order ſo informal and inſubſtantial, ſhall not deprive Mr. *Waller* of a very valuable freehold. *King* v. *Raynes*; an order, in a report in *Raymond*, was ſet aſide for extortion, (to wit) that he took, by colour of office, of *Langborne* (a labourer,) a certain ſum named in the order; then they charge another extortion; and it was not ſpecified that the extortions were committed in the county for which he was clerk. And though the juſtices, in their judgment, declared they removed him for the offences above ſpecified, offences in the execution of his office; yet the order was ſet aſide, after an argument firſt here and then before all the judges, on theſe ſubtile objections, which ſeem merely to affect logical or grammatical nicety. But thoſe ſages of the law thought intendment was not to be admitted where a ſummary proceſs is granted, to deprive a man of his freehold, without a jury. No injuſtice can be done by ſetting aſide the order; for if there be any extortion which occaſioned the juſtices to ſee cauſe for the removal of Mr. *Waller* from his office an order will recommence, and finally be effectual to remove him.

Mr. *Davenport* to the ſame effect—As to the extortion 10*s.* 6*d.* is particularly charged: There was a reaſon for this; it is upon a commitment for felony, for taking lead off a dwelling-houſe. This is made felony by a particular act of parliament; in the old table of fees 10*s.* 4*d.* ſtands as a fee, as for treſpaſs. If by indictment before a jury this had been brought in evidence, it would at once have removed the charge of extortion. The juſtices ſaw this, and therefore, they neither left it to be tried that way, nor laid it ſeparate, "*juncta juvant*;" it's impoſſible, ſay they, but he muſt ſink under one or other of the charges. For this fault, ſo material in the far moſt important part, if not the only one in the order, I hope the order will be ſet aſide.

I was prevented by a ſudden fit of illneſs from attending; but I learnt from a gentleman of *Lincoln's Inn*, that the order was confirmed.

Hunter *againſt* Lord Deloraine.

ACTION on the caſe; demurrer to the declaration, becauſe Lord *Deloraine* was ſummoned.

It was held by the court, he could not be ſummoned, being a peer; and that the court would take notice of his peerage, without it's being pleaded.

Venue.

ON an action of debt, by the Company of Chandlers and Soap-Makers in the city of *Briſtol*, againſt one of the body, for keeping more than the due number of apprentices, on the ſtatute of *Elizabeth*——

It was alledged that the juries of the city of *Briſtol* ſeemed inclined to diſcourage proſecutions in reſtraint of trade, and that ſeveral indictments had been thrown out; and that they believe there is not ſufficient impartiality, and therefore pray to change the venue to *London*, and that it may be tried by a *Middleſex* jury.

Mr. *Lucas*, againſt the rule—This general ſuggeſtion is not ſufficient to ſupport the rule; the matter is between the company, and a member of their own, for keeping more apprentices than allowed. Therefore, no ſtranger being party on either ſide, the diſpoſition to diſcourage ſeems to have no room to operate, ſuppoſing it to exiſt.

The indictment muſt have been on the ſtatute of *Eliz.* and therefore the throwing it out, concerned not them as a corporate body, it not being on a bye law of their own. Therefore, I ſubmit to the court, that the rule for changing the venue be diſcharged.

Mr. *Buller*, on the other ſide—In the caſe of *Mylock* v. *Saladine*, (*Bur.*) a ſuggeſtion of general partiality produced duly before the court, by affidavit, was held ſufficient; and, as is now deſired, it was allowed to change the venue. And the cauſe ſuggeſted was the ſame merely as here; an apprehenſion that a fair trial could not be had, proved by the throwing out an indictment. 4 Bur. 1564.

Lord *Mansfield*—You are right, Mr. *Buller*, in the caſe cited, but the application will not coincide, though you have ſupported the rule very well; but the throwing out of the indictment is not proof of inclination to diſcourage. The matter aroſe on the ſtatute of *Eliz.* to which many have a diſlike. The matter is a ſmall, probably, (from one of the like nature, I remember to have tried) not above 10 *l.* and for that reaſon, the grounds ſhould have been very full.

Not in tranſitory only, but even in local actions, this court will certainly order the venue to be changed, where there is a *dignus vindice nodus*; but not otherwiſe, by any means.

Hodges *againſt* Lovat.

Vide 12 A. ſt. 2. c. 16.

TO recover the penalty on an uſurious contract, on an action brought within a year from *October* 1770, on the ſtatute of Queen *Ann*, againſt uſurious contracts.

Contract made in *October* 1768, but no money paid till 1ſt *October* 1770.

It was contended by counſel, that the contract was only void at the time, but not liable to the treble penalty till the time of payment; therefore, there was a cauſe of action within the time limited by the ſtatute. *Loyd* v. *Williams*, was on contract for 100 *l.* for three months, 6 *l.* was uſuriouſly paid at the time of the advance, and the principal paid back at the end of the time. In that caſe, the money on the uſurious contract was paid on advance, at the commencement of the contract, and the principal only paid back afterwards.

Mr. *Buller*—I hope the whole cauſe of action was the uſurious contract itſelf, and which muſt be proved to have been within a year.

There is an opinion of Baron *Manwood*, *Cro. El.* 20. *Malory* v. *Bird*, If a man, contrary to the ſtatute, agree to take 20 *l.* for the loan of 100 *l.* if he take nothing, he is not liable to the penalty; but if he take a ſhilling, he is; not the money was neceſſary to be taken, but ſomething to bind the contract. Now the negotiable promiſſory note given on the contract binds it, and no more is requiſite. In bribery, the agreement is ſufficient, without any thing given. The plaintiff having declared on the contract muſt prove it within a year; though, otherwiſe, he might have gone on the receipt of the money.

Mr. *Cowper*, in replication—I beg leave to offer in reply; Mr. *Buller* has ſaid, that we declared on the contract, and therefore are barred from plea grounded on the payment. We declared on the uſurious taking of the money the 5th of *October* 1770, in conſideration of the uſurious contract.

Mr. *Buller* has quoted a *dictum* of Baron *Manwood*'s, which I think does not affect us; but only prevents our declaring on the contract merely, without counting on the payment made on the uſurious contract.

In the caſe of bribery, the crime of the party who is to be puniſhed under the ſtatute, is complete from the agreement, though nothing ſhould be received.

Lord *Manſfield*—I think Mr. *Cooper* is right in his argument as to the time of action, for the parties to theſe uſurious contracts being preſſed for a little money, don't except to the terms, till the day when payment makes them ſmart. So that, if the cauſe of action did not ariſe from time of payment, it would in a great meaſure defeat the ſtatute.

Horam *againſt* Lazarus.

ON a motion of Mr. *Dunning* to make a rule abſolute, which had been given to ſhew cauſe why the ſurplus on a *teſtatum fieri facias* ſhould not be repaid to the defendant.

On the affidavits, it appeared, that the debt was 30 *l.* on which, the evening of the laſt day of *Michaelmas* Term, the writ iſſued. The ſheriff comes to the houſe to execute the writ; the debtor deſires the execution may be delayed; the ſheriff refuſes it, becauſe he ſhould be liable, the writ being returnable the next day: But they agree together, that if *Lazarus* can on that day raiſe the money to the appraiſed value of the goods, he ſhall have them then.

The next day the goods are ſold under the execution for 40 *l.* 12*s.* *Lazarus* ſome time in the day brings to the office 80 guineas, and being told the goods had ſold for 51 *l.* he leaves the 30 guineas, and claims return of his goods.

The ſheriffs, however, refuſe to return the goods, as the money paid in fell ſhort of the appraiſed value; nor is the money returned.

The court, on hearing the argument on both ſides, is of opinion, the haſtening the execution ſo violently, by colour of return of the writ, is by no means commendable; nor the detainure of the entire goods, when the debtor had raiſed ſo near the full value.

Therefore, that the rule for the defendant be enlarged for the preſent, and that on repayment of the 30 guineas it be diſcharged, without coſts.

Anonymous.

SUIT by ſpecial original, for a debt under 10 *l.* thrown out, as being bad by the ſtatute.

Bankruptcy.

Anonymous.

ON a commiſſion of bankruptcy, the commiſſioners have full right to enquire, whether one who comes in to prove his debt under a commiſſion, means to proceed at law.

Ejectment, fraudulent.

Anonymous.

IF a declaration in ejectment be ſerved, and the parties to the ejectment, or any of them, aſk what to do with it, and whether they are to ſhew it to the landlord; and anſwer is given by him who ſerves, 'Tis only a form of law that he leaves it, and that it ſignifies nothing to them or any body; poſſeſſion on that ejectment is not good. A clerk who drew the notice of ejectment, being aſked by a perſon who claimed under the landlord in poſſeſſion, whether any thing had been done in the ejectment, ſwears that the queſtion is impertinent; and therefore continues the converſation he was in with ſomebody elſe, waiving any anſwer. This was held by the court a fraudulent ſcheme to procure poſſeſſion: And Lord *Mansfield* ſet aſide the rule obtained upon it; obſerving, NOTHING WAS SO SILLY AS CUNNING.

The King *againſt* King.

ON an inquiſition taken before Alderman Kennet——A motion to ſet aſide the inquiſition for irregularity.

Corbett let a ſhop to a perſon who had a mind to leave it without notice, but was told, that by the cuſtom of *London*, half a year's notice was expected; another perſon admitted tenant, who uſed the ſhop, but going out one morning, upon his return, found a padlock on the door, which he took off. A perſon enters upon the ſhop, as by virtue of an aſſignment of the term from the original tenant, againſt whom the plaintiff ſues; and thereon an inquiſition is taken, againſt which exceptions were made, on the ground of irregularity in the original proceedings.

Vide 5 R. 2 ſt. 1. c. 8.

Objection to the count that Mrs. *Corbett* as ſole ſhop-keeper ſues by the cuſtom of *London*; and that no ſuch cuſtom was before the court to take notice of.

That the venue was ill taken, being taken in a part of *Fleet-ſtreet*, which is a place large enough; and that it ſhould appear in a part neareſt the premiſſes.

That there is no iſſue properly joined; for that the defendant denies the count, and ſays that he entered duly under *Corbett*'s leſſee. Mrs. *Corbett*, who was plaintiff, replies not; but *Woodfall* obtrudes as proſecutor for the King, and denies nothing, but only prays, as the plaintiff, that it may be enquired of the country.

The court was hereupon moved, to quaſh the inquiſition.

Mr. *Buller*, on the other hand, That the caſe being ſettled by his conſent, he expected no more objections than he was prepared to anſwer——

That Mr. *Murphy* was preſent, [at taking the inquiſition] and made no objection to the intereſt not being ſtated as of freehold; which was another of the objections made.

That the court below was to take notice of the cuſtom, without pleading, it being their own cuſtom.

Vide 3 Blackſtone 294.

That the venue was taken from the neighbourhood, which from the definition itſelf appeared to be ſufficient.

That as to *Woodfall* coming in as proſecutor for the crown, without ſhewing how, it's mere form; and there are two caſes of Lord *Hale* [which he cited] to prove it is not neceſſary he ſhould ſhew how he comes in.

Mr. *Murphy*, in reply, obſerved, that the caſes alluded to by Mr. *Buller*, were in one inſtance of a city court taking notice of their own cuſtom; but that this did not extend to a juſtice under an act of parliament, though he might be an alderman. And as to *Woodfall*, though in the other caſe of Mr. *Buller*, the court of King's Bench took notice of their own officer, the maſter of the Crown-Office, as a proper perſon to proſecute for the King, yet it would not extend to this caſe.

It ſtood over; but the court ſeemed inclined to diſcountenance the objections, as formal. 1 *Roll's Rep*. 105. was quoted.

Settlement.

Anonymous.

THE court ſeemed of opinion, that from ſtatute-fair, to ſtatute-fair, was a ſufficient hiring for a year to gain a ſettlement.

The

The King *againſt* Skinner.

ON a motion to quaſh an indictment againſt —— *Skinner*, Eſq; one of his Majeſty's juſtices of the peace of the town of *Poole*, for ſcandalous words ſpoken by him, in a general ſeſſions of the county; in which he ſaid to the grand jury, "you have not done "your duty; you have diſobeyed my commands: You are a ſedi- "tious, ſcandalous, corrupt, and perjured jury."

Serjeant *Davy*, in ſupport of the indictment—That it was of high importance. They who are one of the chief pillars of the conſtitution ſhould not be thrown into open contempt.

An action by any one ſeparate would not be good, becauſe the offence is not againſt *Peter*, *John*, *&c.* in their ſeveral and ſole capacities, or any of them, but againſt them as one body, as a grand jury; and neither could they ſue jointly, becauſe they are no corporate body. A remedy by indictment is proper and neceſſary; it's the only one they can have; it's the natural and uſual proceſs in a crime againſt the public.

If it's refuſed, it will be equivalent to ſaying, Theſe very men ſhould have taken their remedy at law as private individuals, had a particular affront been given to them; but as a grand jury, (where the inſult is vaſtly more material,) they muſt be attacked with impunity, and ſhall have no relief; nor the public, who ſuffers by the indignity done them.

Mr. *Lucas*, againſt the indictment—That it was a very new and ſingular proceeding.

If the words were not ſpoken againſt the jury in the execution of their office, they are not words liable to an indictment; and if they were ſpoken, while they were ſitting in the execution of their office, the judge was ſo too in his: And the principle is clear, that a judge of a court of record is not liable to an indictment for words ſpoken by him, ſitting as judge; eſpecially, becauſe it is not impoſſible to conceive the exiſtence of a corrupt jury: And if the charge was true againſt them, ſhall Mr. *Skinner* be ſubject to a proceſs, in which he would have no power to juſtify, for the truth of the words ſpoken? 2 *Strange* 1157. *The King* v. *Pococke*, on words ſpoken by the defendant of *Kent*, a ſworn juſtice, ſaying "He is ſworn, and is a knave, "and forſworn;" agreed, that it was not actionable, becauſe ſpoken with reference to a matter paſt, and not ſpoken againſt him in the execution of his office. 12 *Mod.* 98. It would be impoſſible the authority

thority of a judge could ever be ſupported, were they liable to the ſuit of any perſon, for words ſpoken by a judge as ſuch.

Lord *Mansfield*—I am willing, as neither Serjeant *Davy*, nor Mr. *Buller*, find any precedent in the Hiſtory of *England*, for an indictment of this kind, to give them time till next term to find any.

What Mr. *Lucas* has ſaid is very juſt; neither party, witneſs, counſel, jury, or judge, can be put to anſwer, civilly or criminally, for words ſpoken in office. If the words ſpoken are opprobrious or irrelevant to the caſe, the court will take notice of them as a contempt, and examine on information. If any thing of *mala mens* is found on ſuch enquiry, it will be puniſhed ſuitably.

Vide Sh. P. C. 173. a. Vaughan 135. 12 Rep. 24.

The words are extremely improper. If the party were not a borough juſtice, I ſhould think there might be grounds to apply to the great ſeal to remove him from his office. But to go on an indictment, would be ſubverſive of all ideas of a conſtitution. If any precedent ſhould be found, you ſhould have time to make uſe of it; otherwiſe it would be proper to quaſh the indictment immediately.

Dodd *againſt* Innis.

In Arreſt of Judgment.

ON an action for breach of covenant. The cauſe of action was on a leaſe, in which leſſee covenants with leſſor, to leave ſufficient compoſt on the ſoil of the landlord, at the end or ſooner expiration of the term, the leſſee having the yard, barn, and a room to lodge in and dreſs diet.

Upon theſe words of the leaſe, the defendant pleads, that he did not covenant; but that there is a condition, if the leſſor gives room for corn, then the leſſee ſhall leave compoſt.

Mr. *Wallace*, on the other ſide—'Tis very extraordinary, Mr. *Innis* ſhould not demur to the declaration of the plaintiff, but wait till verdict went againſt him, to enhance the coſts. 'Tis true, the leſſee covenants and agrees to and with the leſſor, and yet the covenant is contended to be on the part of the leſſee only. If the words had been, *ſhould have*, or *ſhall have*, the covenant could not have been queſtioned. I truſt, the word *having* will be quite ſufficient for the ſame purpoſe.

In replication, for the defendant. Mr. *Wallace* has objected no demurrer to the declaration. Mr. *Innis* was conſcious of it's being a condition, and therefore reſted the matter of fact with the jury;

and had it not happened, we had but three gentlemen on the ſpecial jury, probably the cauſe would have gone no farther. 'Tis plain, the jury gave a verdict that muſt be ill grounded; they gave one ſhilling damages, which, if any damages were incurred, muſt be vaſtly incompetent.

The plain intention was, that the covenant, which we call a condition, was for the advantage of the leſſor; who, if he thought proper, might have the compoſt, on furniſhing the room, barn, *&c.*

Mr. *Dunning*—It cannot be doubted, both from the words and ſenſe, I think, that the leſſor meant to leave himſelf at liberty, as in terms he has done, to give him the uſe of the barn, if he inclined to take the benefit of the covenant.

Mr. *Bearcroft*—The expence of a ſpecial jury was incurred by the defendant, that the tenants might not determine between landlord and tenant; however, he could only obtain three gentlemen, and the reſt were tenants.

I don't think law caſes are neceſſary here, but the plain common ſenſe of the words.

Lord *Mansfield*—The argument of Mr. *Bearcroft* is a very good one; and I am glad to find there's ſuch perſpicuity in language, that there was learning wanting to raiſe any difficulty in the matter. The parties had none; they were plain ſenſible men; accordingly, they put the iſſue on the fact. "You did not give me room to be-"ſtow my ſtraw, *&c.*" ſaid the tenant. "I did," ſays the leſſor. Can there be any thing clearer, than that the covenant could not be to reſide in the breaſt of the landlord, to make election during any part of the term? Had it been ſo, the tenant beſtows his corn and ſtraw, houſes his cattle, *&c.* and then comes to the landlord, and ſays, "I don't want you to furniſh compoſt; and that being the condition "on which you was to lodge your corn, and have the other benefits "expreſſed; take your corn, cattle and ſtraw, and carry them where "you think good." Where the tenant covenants to repair, if the leſſor finds ſufficient timber, the proviſo reſtrains the covenant: But in this caſe there is not the leaſt foundation for ſuch conſtruction. Let the rule in arreſt of judgment be diſcharged.

Davis *againſt* Taylor.

ON a motion to make a rule abſolute, for putting off a trial ——Mr. *Jones*, in ſhewing cauſe againſt the rule, alledged to the court, that it was a caſe on an action againſt a ſurgeon for unſkilfulneſs; that the declaration was entered the laſt term, and the matter was duly ſet down for trial; but that, on ſuggeſtion of the abſence of a material witneſs, proceedings have been ſtaid. That it is a ſcheme to delay till the ſittings in *Michaelmas* Term; and therefore, as they might have had their wiſhes, that he hoped the cauſe would go on immediately.

Mr. *Cox*—That there was a material witneſs; and that the plaintiff would be ready to try the cauſe the ſittings after term.

Lord *Mansfield*—You gave notice; why did you venture ſo far, when you had not your witneſs?

Mr. *Cox*—We were diſappointed of him then, and are uncertain whether he can come before *Michaelmas*!

Lord *Mansfield*—And yet offer to try it the ſittings after term! Palpable ſubterfuge upon the face of the motion.

Mr. *Cox*—My lord, we would be ready to try it, rather than delay till the next term; but we would like the probable chance of getting him by a ſhort ſtay.

Lord *Mansfield*—It's an exceeding oppreſſion and vexation of defendant's; this contrivance practiſed, of putting aſide trials from term to term, by the court's relaxing it's practice, has gained greatly too much ground. All the inconveniences the act was deſigned to ſtop will recur, if any ſlight cauſes be allowed for enlarging time after notice given of trial.

Notice irregular.

A Notice having been ſerved on a rector of *Wales*, in a writ of *latitat*, on ſuit of a curate, to bring him into court, to anſwer for non-payment of ſix years and a half penſion, for ſervice of the cure, at 12 *l. per annum*; on return in court, it not appearing the name of the attorney of the plaintiff had been inſerted, the rule was obliged to be diſcharged, but without coſts. Lord *Mansfield* declaring, if there had been a poſſibility of ſupporting the rule, he would have taken advantage of a ſtraw.

Motion to diſpenſe with the perſonal Appearance of certain *Cambridge* Scholars.

On Judgment to be given on Aſſault.

MOTION to diſpenſe with their perſonal appearance, on account of their being in *Ireland*; of which they are both natives, and have conſiderable connexions there. Prayer, that a fine may be accepted, on a ſuggeſtion that their preſence would be to no purpoſe, as the court would ſee no grounds for puniſhment by way of example.

Mr. *Dunning*—It ſeems extraordinary, it ſhould be deſired perſons ſhould be diſpenſed with becauſe they are in *Ireland*, when they ought to have been here. The truth of what Mr. *Pemberton* aſſerts, is foreign entirely, as it ſeems to me, when they have pleaded guilty, and from thence become ſubject to judgment. If they thought their caſe was good, they had nothing to fear. I can't conceive why, immediately on having pleaded guilty, they ſhould withdraw themſelves.

Mr. Juſtice *Aſton*—In *The King* v. *Harwood*, a very aggravating caſe, it was long argued, whether, on affidavits, appearance ſhould be diſpenſed with; and the groſs abuſe of his office as juſtice of peace, was the cauſe on which it was refuſed to diſpenſe with appearance.

Lord *Manſfield*—If from the nature of the aſſault you have any aggravating circumſtances to prove by affidavits, we will grant you a rule to ſhew cauſe; otherwiſe, their age and ſituation are ſufficient cauſe why we ſhould not bring them, at an expence greater perhaps than the fine the court would ſee fit to adjudge, to gratify the proſecutor, by expoſing them in open court; eſpecially, as they have in ſome manner atoned for their miſconduct, in pleading guilty. A very ſmall cauſe, on a common aſſault will be allowed to diſcharge perſonal appearance: Would not the court have diſpenſed with the rioters laſt term, if the fine had been undertaken? Rule to ſhew cauſe.

The King *againſt* Plumbe.

ON a rule to ſhew cauſe why a *certiorari*, by which a cauſe had been removed from the court of the mayor and aldermen of the city of *London*, on a plea of certain franchiſes, ſhould not be quaſhed.

This caſe had been argued the preceding term by Mr. *Wallace* and Mr. *Manſfield*, againſt the rule; Mr. *Dunning*, for the rule.

Mr. *Wallace* argued, on the ground of the authority of the court over all the inferior juriſdictions in the kingdom.

He farther argued, That till after the return of the writ, the court of King's Bench never ſtopped the *certiorari*, on a ſurmiſe that the court below had a right to a *procedendo*.

Several caſes were cited, in which the *certiorari* was ſued out of the court, and return made of the writ; in which it was held here, that disfranchiſement was not lawful for words.

Mr. *Mansfield*—The queſtion is not whether this court will ultimately take cognizance of the information, nor whether it can, againſt the mayor and aldermen; but only whether the court will not examine the information? whether not ſee, if there be cauſe of the disfranchiſement; or, on the contrary, no cauſe being ſeen, will not at once end proceedings here, or any where elſe?

Mr. *Dunning*—It has been ſaid, that a *certiorari* can never be quaſhed till after return; in moſt caſes, I conceive, it may more properly before. The caſe of the city of *London*, different as in many reſpects from other corporations, is in this perfectly the ſame with all others; therefore the juriſdiction of this court, if it grants a *certiorari* in this inſtance, cannot refuſe to the meaneſt corporation. This court has no juriſdiction to disfranchiſe the members of a corporate ſociety. Let it be ſuppoſed, your lordſhip ſhould think that the disfranchiſement was good, or the other way; your lordſhip could not, nor would ſtop the proceedings below. It would be very convenient, were it lawful, in a thouſand inſtances, to bring the cauſe hither to get an opinion: But the law has no notion of ſuch convenience. In this ſtage of the buſineſs, it is not competent for this court to give it's deciſion. I believe, the carrying with them ſuch a direction, would be very convenient to parties: But I hope it has never been found neceſſary, nor will at this time, in this place, be judged competent.

It has been hinted by Mr. *Wallace*, as if the court below had no authority to proceed. I am confident, 'tis impoſſible they ſhould be more irregular than they would in ſetting out here. The caſes ſtated, as far as they went, ſeemed for a *certiorari*; but on farther view it appears, that in one of the inſtances particularly, the party was impriſoned by the court below after disfranchiſement for words. I mean not to contend, nor I believe will any body doubt, that a writ of *habeas corpus* will go forth from this court, when a man is deprived of his liberty. In another, they had paſſed ſentence of the fine. This is not a charge under a general criminal juriſdiction, nor an offence by the courſe of the common law; it is one of the corporation in itſelf. It were indecent to have the diſputes liable to ariſe on an opinion given by this court, interpoſing unneceſſarily, and therefore improperly. As to the right of disfranchiſement, the mode, and ſeveral circumſtances flowing from the proceedings in the court below, when the judgment of the court below goes on either ſide; this court, on application of either party, will judge the matter of law, and of the right of the corporation.

I cannot imagine why application ſhould be made in 1772, to bring, irregularly, a cauſe before this court, which, if any diſſatisfaction is taken on the inferior judgment, will come regularly hither; eſpecially, when the whole effect to be had would be, the fetching papers up to be ſent down again preciſely in the ſtate they came.

Till ſome act has been done injurious to the right, by disfranchiſing; to the property, by ſetting a fine; or the perſon, by impriſoning; I am ſatisfied your lordſhips will not interpoſe. All the caſes cited, or that can be cited, I am poſitive, fall under one or other of theſe three deſcriptions. Has there been any inſtance, where on a mere complaint a *certiorari* has been eſtabliſhed? This is merely ſuch a complaint of a corporate body againſt a member of it's own.

The court denied a *certiorari.*

Lord *Mansfield*—Though no precedent of a *certiorari* quaſhed before the return, yet there can be no reaſon againſt it, in caſe the writ ſhould not have iſſued. *Bur.* Caſe of the Quakers; as title was not judged in queſtion, the *certiorari* itſelf, after the return filed, was quaſhed; and a ſuperſedeas iſſued againſt it.

The writ of *certiorari* not being a miniſterial writ, but a prerogative writ, as *mandamus*, *habeas corpus*, *&c.* muſt have proper foundation on an affidavit, or on the face of the writ. In courts not ſuperior, but ſuch as this court will pay a proper deference to, there is a moſt abſolute neceſſity not to interfere with their proceedings, without full cauſe. Let us conſider to what effect it would be: Not to try the franchiſes; for nothing is there in the writ or application of parties, from whence we can take cognizance. No information of miſtake in law, or any other particular, on which to remove the cauſe. To view the proceedings, and ſend them back for deciſion, would be nugatory. Four caſes only in an hundred years; *Rogers*, for words and an aſſault; a *certiorari* iſſued, and afterwards a *procedendo*; though, in an aſſault, this court has certainly a concurrent juriſdiction. In that, and all the other caſes, no effect followed from the *certiorari*; therefore, we all agree, that the *certiorari* be quaſhed.

The King *againſt* Backhouſe.

IN an arreſt, the officer apprehending difficulty in executing of the proceſs, made a pretence of a note, which the defendant to this ſuit ſaid he ſhould be glad to ſee. With ſome difficulty, he was let in; and comes up to the defendant, and tells him he has a writ to execute on him for 40 *l.* And *Backhouſe*, much enraged,

raged, ſaid, his houſe was his caſtle. That then the bailiff ſaid it was very ungenteel; on which, *Backhouſe*, (the officer ſays, and the other officer who ſtood without and ſaw the bailiff running) aimed a piſtol at him. On a trial, the jury find *Backhouſe* guilty. This motion being after a verdict, no evidence as to the fact of the aſſault was admitted; but on it's being ſhewn to the court, that the man was a bankrupt, on affidavit; with confeſſion of the party on the trial, that he would charge an aſſault on the whole family; which he did, by ſwearing before a juſtice an aſſault to the father, having made his firſt complaint againſt the ſon only; then, before the grand jury, he added the mother.—On theſe grounds, and a probability found that the ſuppoſed piſtol was a ſugar-hammer, and that the officer who ſwore to the arreſt was intercepted, by a paſſenger ſtanding before the window, from ſeeing what paſſed, the injury and prevarication of the action, the inability of the defendant to pay any large pecuniary penalty, and the groſs abſurdities in many of the moſt ſubſtantial parts of the evidence, it was prayed in arreſt of judgment, that a very moderate fine might be impoſed.

Mr. *Wallace*—If apprehended or real bankruptcy be admitted, the execution of juſtice will become impracticable. I therefore hope, as the jury have found the defendant guilty, though they have acquitted all the reſt, the court will ſubject him to coſts, and a ſatisfaction, to check ſo unwarrantable a reſiſtance for the future.

Lord *Mansfield*—By all the evidence on the trial the defendant was moſt clearly guilty; they all agree as to the bailiff's running out; (whether what *Backhouſe* uſed againſt the bailiff was a piſtol or a hammer, the bailiff was greatly intimidated, and, at leaſt, took it for a piſtol.) The precedent is an extreme bad one, of ſuffering offences of this nature to eſcape ſlightly; he muſt either compound by his friends, if they will undertake as ſuggeſted, or ſuffer corporal puniſhment.

Mr. *Wallace*, counſel for the proſecutor, accepted one guinea; with coſts to be taxed by the maſter as between attorney and client. The court, on undertaking by the defendant to conform to the terms, ſet a fine of one ſhilling.

King *againſt* Davis.

FOR a rule to ſhew cauſe why an information ſhould not iſſue againſt —— *Davis*, Eſq. a collector of the cuſtoms, and juſtice of peace, for ſitting as one of the juſtices under the ſtatute of 12 *Ann*, *c.* 18. to eſtimate the ſalvage of the veſſel; of which ſalvage, by the act, he was entitled, as cuſtom-houſe officer, to a part.

Brery, a fiſherman, claimed 50 guineas for ſalvage, which *Williams*, the owner of the veſſel, refuſed; and ſaid, that he had not been run aground, but by *Brery*'s man. On this, *Brery* applies to Mr. *Davis*, for a detainer of the veſſel, till the owner, Captain *Williams*, ſhould anſwer to the claim of the ſalvage. Mr. *Davis*, being one of the three juſtices of the counties adjacent, ſat to try the queſtion of ſalvage between the parties. It appearing before them, upon examination, that the ſchooner was worth 9000*l.* and the ſmack 300*l.* that the former would have periſhed, after quitting the trackled, had not the ſmack, at the peril of itſelf and crew, ſaved it; the other ſide giving no evidence, they decided for the claimant. It's objected to Mr. *Davis*, he refuſed Mr. *Clement*, a juſtice of the county, propoſed by the maſter. There's a clauſe, it was argued, in the act, which prevents his being proceeded againſt by information; becauſe, on conviction, it ſubjects him to a conſiderable penalty, forfeiture of office, and incapacity of acting as juſtice: And 'tis hoped, this court, after forty years in office, will not, without accuſation, ſubject him to an information.

On the other hand, the objection againſt Mr. *Davis*, that he ſhould not have been the juſtice, but was to have appointed one, was argued.

The court was of opinion, that as the act, on diſpute, empowers the parties to appoint three juſtices; therefore he was not to appoint himſelf, nor exclude the other ſide from appointing, as by the affidavits it's proved he did; eſpecially, as he took a bond of indemnity for whatever might be the conſequence of the matter between the parties, and as a ſatisfaction is granted to the cuſtom-houſe officer under the act.

The court therefore of opinion, that the rule ſhould be made abſolute.

Lincoln, a man belonging to *Brery*'s veſſel, ſwears, that *Brery* would have periſhed in ſteering towards the ſchooner, had not the wind turned the ſail round.

The court thought the award of the cuſtom-houſe officer a very reaſonable one; who ſaid, that had half a guinea been agreed, a guinea was merited. And they were of opinion, the difference about the danger of the veſſel would not entangle the queſtion. So that the ground ſeems to have been by no means the unfairneſs of the deciſion, but the great impropriety and irregularity of his ſitting as judge, who, as cuſtom-houſe officer, was to take benefit of the value of the ſalvage.

Tuite or Chote *againſt* Fawkes.

ON a rule to ſhew cauſe why an information ſhould not be granted againſt the defendant, for forcing the plaintiff to ſell cheeſe at three pence *per* pound, by menaces——

Chote, by his affidavit depoſes, that on the 10th day of *April*, a riotous aſſembly happened at *Dunmow* in *Eſſex*; and people came, to the number of fifty, threatening him, and ſo compelling him to ſell butter at 6 *d.* (he dwelling then at *Benton*, two miles off *Dunmow*,) and cheeſe at 3 *d.* That a day or two after, *Charles Fawkes*, a conſiderable innkeeper, who had been ſtrolling about the country, came and ordered a cheeſe at 3 *d. per* pound, which *Chote* ſaid he could not afford. *Fawkes* perſiſted urging him, and aſked him, in a menacing way, "Only ſay you won't;" and intimated, that if he did not, other people would come and ſell it for him. And that, in fear of having the mob on him, he was obliged to ſell. And that *Gibſon*, a labourer, ſervant to *Fawkes*, came ſoon after; and, he ſays, that *Gibſon* had a cheeſe at the ſame price, from the ſame apprehenſion, that he was employed by *Fawkes*.

Fawkes depoſes, that the riot was firſt diſcovered by him, that he had as much cauſe to dread it as any body; that he gave the firſt notice of it; and verily believes, he was principally inſtrumental in ſuppreſſing it, by telling people, invited to join the mob, whom he had conſtantly employed for many years, that he would never more employ them if they did. That ſeveral of the moſt conſiderable tradeſmen, in order to quiet the mob, he is informed and believes, cauſed it to be proclaimed by the common cryer, that they would ſell their cheeſe at 3 *d. per* pound; when he did, as well as many others. That he went to *Chote*, not uſing any menaces, or ſaying that he would ſell for him, or any thing to that effect or intent; and that *Chote* readily conſented. And ſays, that he made the bargain, not out of malice, on a view to take advantage, but thinking it the fair price of the cheeſe. And that the mob was diſperſed two or three days before.

Others of *Dunmow*, on the part of *Fawkes*, made oath that *Fawkes* was a conſiderable innkeeper, and had no intereſt in their belief, to encourage the mob; but on the contrary, out of a good intention, gave the firſt intelligence that the mob was diſperſed two or three days before. And that they believe the price was fair; and the information out of a malicious and wicked deſign.

Obſerved, againſt the rule that *Fawkes* is not mentioned in the firſt riot, nor any thing about him; that he is brought in after by *innuendo*, ſo as to involve him in an odious imputation, without the leaſt particular aſſigned as ground: And that the whole charge is as poſitively denied, and as fully, on the one hand, as it could poſſibly be charged on the other. On which grounds, from the inſufficiency of the proof, and the ſtrong appearance of malice on the plaintiff's affidavit, it's deſired and hoped from the court, that the rule be diſcharged.

On the other part it was urged, That *Fawkes* ſpoke to a proclamation which he believes to have been made, without ſaying of his own knowledge, or producing a ſingle witneſs to ſo public a fact: That affirming it was done to pacify the mob, he nevertheleſs applies to *Chote*, out of the limits of the proclamation, two miles from *Dunmow*, and not to any of the tradeſmen of *Dunmow*: That the price for which the cheeſe was ſold is confeſſed by both their affidavits, and gives very ſtrong preſumption, if no other part corroborated, of the truth of the fear and menaces alledged by the plaintiff.

After hearing this contradictory evidence, the court diſcharged the rule.

James *againſt* Penrice.

ON a rule obtained to ſhew cauſe why action ſhould not be ſtaid, on account of defendant being become a bankrupt; the motion was objected to, becauſe it might have been litigated upon a plea, and that defendant means to litigate it.

Rule diſcharged.

ON a motion, that cauſe may be ſhewn why a writ of enquiry ſhould not be executed here, in *London*; in a caſe of a clerk, to determine what was due from his maſter to him: On ſuggeſtion, that the jury at *Guildhall* would be of low and indigent perſons, and not qualified to eſtimate where the matter might be of ſome hundreds.

Court—No colour.

Lady Mayo's Caſe.

TRANSFER of monies in the Bank, in the name of a feme-covert, made by the huſband; which monies, it was ſuſpected, ſhe held by virtue of a truſt to her own ſeparate uſe. A memorandum was made by the Bank, on transferring the ſtock, of a defect of title ſuſpected. It was held, that to make a memorandum on transfer of ſtock, ſignifying a flaw ſuſpected in the title, muſt not be allowed; nor will any ſecret truſt, as againſt the party who has open legal title, affect the Bank. And Lord *Mansfield* added—I won't ſay a word againſt the holder of the ſtock having his action againſt the Bank for diſparaging his title.

Curia Cancellaria, at Lincoln's Inn.

Simple-contract creditors cannot come upon the real eſtate.

WHEN there is a real eſtate of 1200*l.* value, debts on bond to 1000*l.* and on ſimple-contract to 1000*l.* more; all that can be done is, not to let the bond-creditors in upon the perſonalty, but the ſimple-contract creditors cannot touch the 200*l.* ſurplus of the realty.

Tythes.

Modus, when not binding. Vide 13 Eliz. c. 10. 2 Black. c. 3.

MODUS ſet up ſince the 13 *Elizabeth*, binds not the ſucceſſor.

Temporary compoſition.

A temporary compoſition requires notice to determine.

Endowment of tythes, with failure of uſage.

If endowment be of tythes, and uſage has not followed the endowment, the claimant, as to ſuch tythes as fail of uſage, ſhall not ſupport his claim; any more than on a conveyance of lands he ſhall claim lands as parcel of the eſtate conveyed, where poſſeſſion has not followed the conveyance.

Coſts, when defendant claims more tythes than there are tythable goods.

If more tythes are claimed than the defendant to the bill has kinds of tythable goods, the practice of the Exchequer is, (it was repreſented to the court) to diſcharge the bill with coſts, as to ſuch tythes.

Effect of miſpleader of a modus.

It appears, that miſpleader of a modus in the Exchequer always occaſions a decree for tythes in kind; even though it appears in evidence that it was a good modus; but it is without prejudice to the inhabitants of the pariſh.

Raymond *againſt* Webb.

Truſtee may not vary the mode of ſale preſcribed.

A Truſtee under a will, ſells by private contract an eſtate in truſt, which by a decree of Lord *Camden* was to be ſold before a maſter; the plaintiff, who was bargainee of the eſtate, was not party nor privy to the decree, but was a purchaſer without notice, for a valuable conſideration.

Lord Chancellor—After a decree by Lord *Camden* in this caſe, that the eſtate ſhould be ſold before a maſter, the court cannot now warrant a ſale by private contract.

Mr. Attorney-General contended, that the objection to the decree of Lord *Camden* interpoſing, was, that the plaintiff was no party to that decree.

Lord Chancellor—All the effect of that will be, the plaintiff may recover at law, which otherwiſe he could not.

Bill diſmiſſed: The party being left to take his remedy at common law, the court being of opinion that equity ought not to interpoſe.

Michaelmas Term,

12 Geo. 3. 1772. K. B.

Campbell's Caſe.

On a Plene adminiſtravit.

ON a motion for a new trial—On an action brought againſt executor, he pleaded *plene adminiſtravit*; there was evidence that he had paid intereſt upon a legacy of the teſtator's. The jury found for the plaintiff. It was contended, that upon the evidence, they ought to have found for the defendant; for that there was evidence of his having fully diſcharged, as far as there were aſſets. On the other hand, that by paying intereſt on the debt, he had admitted aſſets. It was urged, that this payment of intereſt was injurious to the legatee, by lulling him into a falſe ſecurity, while the executor ſpent the aſſets in paying debts of an equal degree.

It was urged, that in the caſe of the Duke of *Somerſet*, intereſt paid for ſeventeen years, was determined by the maſter of the Rolls, and confirmed by the Lords Commiſſioners, to be evidence concluſive of aſſets.

Lord *Mansfield* obſerved, that payment was *prima facie* evidence; and repeated payment, with length of time, very ſtrong preſumption: But that, though it impoſed on the executor the *onus probandi* to the contrary, yet it could not in any caſe be taken concluſively againſt all evidence poſſible to be given.

That the payment in the principal caſe was pleaded, to have been four years continually. The difficulty the laws have laid on executors, for ages, has been properly complained of, that honeſt executors know not how to be ſafe, nor diſhoneſt can be puniſhed.

Where there is a bond-debt unknown to the executor, and there has been a payment of intereſt on a ſimple-contract debt, before the bond-debt comes out; in which caſe, it would be *mala fide* to pay the principal on the ſimple-contract, unleſs the bond-debt could be ſatisfied firſt; ſhould the payment of intereſt on the ſimple-contract, under ſuch circumſtances, be concluſive againſt the executor? Certainly not.

His Lordſhip deſired, that he might not be underſtood as giving an opinion, that the executor would be allowed debts in an inferior or equal degree after payment of intereſt, in the debt in queſtion; for that then an executor might take an occaſion, by paying a ſmall ſum on account of intereſt, to deceive and fruſtrate the juſt expectations of a creditor in higher degree, in favour of a creditor in inferior degree. That in all events, there was cauſe to grant the rule for a new trial.

The rule was granted accordingly.

Clark *againſt* Adair.

IN this caſe it was determined, that an engagement of inteſtate to pay money out of a growing fund, was a lien upon the adminiſtrator chargeable upon that fund.

Raymond *againſt* Bridges

ON a writ of error brought againſt a judgment in the court of common pleas——

The judgment was on an action on the caſe againſt the ſheriff, in which there were two courts:

1ſt. That the defendant ſuffered *John Champion*, indebted to the plaintiff on account in the ſum of 20*l.* 17*s.* 10*d.* to eſcape.

2d. That the defendant being ſheriff of the county of *Eſſex*, might have arreſted *Champion*, and did not.

The judgment, with damages and coſts, amounted to about 60*l.*

For the plaintiff in error, error aſſigned againſt the judgment, that the two counts are totally repugnant; ſuppoſing the cauſe of action in both the ſame.

That they are the ſame is evident, The ſum is preciſely the ſame; both notes are dated the ſame day; both payable in ten days after date; the writ ſued out in both on the ſame day. It will be ſaid, every thing will be intended in favour of the verdict; every thing that can be reaſonably intended: But here, I conceive, the mere natural intendment will be, that the party was trying, whether he might not recover though one note only was given, by counting on two; or recover one way if he could prove an eſcape, and in the other if he could prove there might have been an arreſt and was not: Your Lordſhip muſt intend too, that in the ſame day the plaintiff ſued out two writs on notes of hand, when he might have recovered by one; you muſt intend too, that he did not know how much 20*l.* 17*s.* 10*d.* amounted to twice told, for he lays his damages at 40*l.* very reaſonably if on one note only, but prepoſterouſly and unaccountably if on both. For your Lordſhip knows, if any ſum, how great ſoever, be proved, the plaintiff can recover no more than he has laid his damages in the declaration. I muſt, with great deference to your Lordſhip, obſerve, the court of Common Pleas differs from this court, in this; that if there be ever ſo many counts, and any one of them is proved for the plaintiff, he ſhall recover damages in his whole action, though the other counts go for the defendant.

I am told by the attorney, theſe two counts will make a difference in expence of 20*l.* to the defendant in that action, the now plaintiff in error.

In this court, I am told, if the plaintiff lays ſeveral counts in his action and proves only ſome, he can have coſts only on the counts he proves; and that your Lordſhip went farther, and ſaid, the defendant ſhould have coſts where no proof was for the plaintiff.

[Lord *Mansfield*—I did ſo; but it was in the caſe of very ſpecial pleas. Therefore, where the plaintiff does not prove his counts, neither he nor the defendant has any coſts in them, in common caſes.

It was obſerved, that when the ſtatute of *Glouceſter* firſt gave coſts, ſuch was the ſimplicity of the common law, the counts were ſingle, declarations ſingle, and every thing much ſhorter than at this time.

Lord *Mansfield* obſerved, That ſuppoſing there were but one note, juſtice had been done; the plaintiff had recovered no more than he was intitled: That nothing but a neceſſity of finding the note ſingle could be regarded, ſo as to diſaffirm the judgment. That every count was conſidered a diſtinct action; that thoſe multiplied counts had taken riſe from an inconvenience not many years ago in a caſe of this nature. *That fineſſes of this nature were very proper in furtherance, very bad in hindrance of juſtice.*

Whether

Whether a Power of Revocation aſſignable under a Commiſſion of Bankrupts.

ON a queſtion, whether a power of revocation was an intereſt capable of paying to the aſſignees under a bankruptcy; the power being not in poſſeſſion, but expectant on a contingency.

The power of revocation in the bankrupt was to take place on ſurvivorſhip, and the bankruptcy aroſe before the event happened.

It was ſaid, this was within the 13 *Eliz.* 34 *H.* 8. 21 *J.* 1. 5 *G.* 2.

That theſe acts, though ſeparate, have ever been conſidered joint laws, and interpreted liberally and beneficially. Here was an eſtate for life; firſt to his wife, then to himſelf, remainder to his iſſue, and for default of ſuch iſſue, remainder abſolutely to himſelf. His wife, by whom the iſſue was to be had, was dead; he had no iſſue, could have none to take under the deed, therefore the remainder veſted in him; and being ſo veſted, was aſſignable: If not aſſignable, it's extinguiſhable.

Mr. *Buller* argued, there could be no fraud to the creditors, as there was no benefit they could take.

Lord *Mansfield*—The eſtate for life, remainder to himſelf in fee, is veſted in the aſſignees; he could convey it by a common deed: The conſcience therefore is, that he has no power to execute now, for the other limitations could not take place; the whole was in him, and is now in the aſſignees.

Goodwin *againſt* Philips.

THIS was a caſe, in which a jury, being at difference in themſelves what verdict to find, on account of contrary circumſtances, to balance, as it ſeemed, the evidence on both ſides agreed the majority of voices ſhould decide. A party to the cauſe (the plaintiff) goes, and by private converſation finds this out.

Seven were on the ſide of the verdict, four againſt, and one doubtful. They debated it; and at laſt the majority brought over the others to agree, that their opinion ſhould determine.

The court, on all theſe circumſtances, would not ſuffer a motion againſt the verdict; eſpecially, as it was given on that ſide where they thought the evidence ſeemed to preponderate.

Bail.

PARISH of their reſidence, is not a ſufficient deſignation in notice of bail.

Bail not knowing how many he is Bail for, rejected.

BAIL aſked, how many he was bail for ſince he obtained his certificate? *Anſwer*—Three. *Queſtion*—Any more? *Anſwer*—Not that he knew.

Lord *Mansfield*—Don't you know how many you are bail for?

I don't keep an account.

Lord *Mansfield*—Then no man that does not ſhall be bail in this court.

Notice of Bail.

The effect of irregular notice.

THE conſequence of irregular notice is not diſcharge of the bail as bad, but grant of a future day to enquire.

Demand of Plea.

Toll.

Plea demanded on a Sunday, is to be conſidered as no demand at all.

ON a queſtion, upon a toll for corn, it, was diſputed, whethe malt was to be conſidered as corn?

Lord *Mansfield* thought it was in the nature of flour; and being manufactured, and taking the denomination of malt, it was not to be held corn, but changed it's ſpecies: And for flour, which was in the ſame predicament, no toll had been pretended.

But upon a motion for a new trial, upon the ground of the act of parliament having conſtantly conſidered malt as corn, and ſo in the univerſity-grants; his Lordſhip ordered a new trial immediately upon the motion, without coſts.

The King *againſt* Eden.

Information.

ON a rule to ſhew cauſe why an information ſhould not b granted againſt the defendant, Mayor of *Derby*, for diſperſing a paper charged to be a libel, reflecting on an attorney o the mayor's court.

Objectio

Objection againſt the rule—That there is no evidence to prove the publication complained of, nor that Mr. *Eden* was the publiſher, nor that the party complained of was entirely innocent of the charge.

The paper complained of, was a petition againſt the attorney for keeping the petitioner in cuſtody after having taken money for his diſcharge; and it was objected, that the affidavits of publiſhing and diſperſing by Mr. *Eden*, went to memory, belief and opinion.

That this was an application in the way of extraordinary juſtice, and that the party applying ought to come clear before the court; and that the attorney was guilty of the breach of duty charged.

Mr. *Wallace*, on the other ſide—The carrying to the printer is proved againſt Mr. *Eden*; and this is publiſhing. The mayor had miſbehaved himſelf moſt flagrantly, in joining in the petition, that the attorney might be diſcharged for his diſhoneſt behaviour. The petition was addreſſed to the Recorder of the preceding year, (which certainly is not the ſtile of the court,) and to all honeſt and humane perſons; which makes it ſtill more general.

The court ſeemed to think, that the carrying to the printer was not publiſhing, on the circumſtances in this caſe; and that this way of proceeding by information was very improper.

Rule diſcharged.

The King *againſt* Coate, the Keeper of a Madhouſe.

ON a motion for judgment of the court, for confining a perſon in a madhouſe——

Lord *Manſfield*—This was an indictment againſt *R. Coate* the elder, and *Suſanna* his wife, *Coate* the younger, *Ewbank*, and others, for ſending Mrs. *Ewbank*, unjuſtly, and without legal warrant, to a private houſe for the reception of perſons diſordered in their minds, and there confining her for two months nearly. Mrs. *Ewbank* ſwears, ſhe was very ill uſed by her huſband, who took her children from her; afterwards he beat her, and uſed her very ill. Then he told her ſhe muſt go to the child, who was ready to die, at *Stratford*; that he took her; ſhe deſcribed the way and manner. The huſband ſaid, "This is for ſending to me." "I never ſaw," ſhe ſays, "a doctor or apothecary in the time. A lunatic bit my arm. I "was chained. A ſurgeon was ſent for, as pretence. A gentleman "and lady came, and pitied me. I feared the child would be hurt,

“ or he would take the child and murder it on a common. Mrs.
“ *Mills* came and lamented, I pitied her; ſhe was ſent by order of
“ her huſband, who, ſhe ſaid, had done the thing with Mrs. *Miller*.”
Mrs. *Eccles*, another witneſs, the ſame who ſhe ſaid came with a gentleman, ſaid ſhe was an honeſt, very ſenſible woman; that her huſband uſed her very cruelly, and that ſhe ſaid he uſed the child—!—That ſhe went to conſult an attorney, how ſhe might have a ſeparate maintenance from her huſband; that ſhe was perfectly ſane when ſhe ſaw her; that ſhe pitied her extremely, and wanted an *habeas corpus* to releaſe her; but was told it would be very expenſive. “ What, if my huſband had another wife!”. She ſaid, the huſband had ſaid, he would ſend his wife to a madhouſe.

Mrs. *Mills* ſays, ſhe was confined in a madhouſe, with one perſon ſane, and another a lunatic; that ſhe lamented, and Mrs. *Ewbank* with her lamented extremely; that they concerted matters together, to get her out; that Mrs. *Mills* wrote a direction, and hid it in her boſom.

On the part of the defendants. Of her being mad, and accuſing her huſband with every woman. That ſhe would ſpit in people's faces, and the boys followed her in the ſtreets. That ſhe was either mad, or worſe. That the huſband was a very honeſt man. That *Miller* did not believe what ſhe had ſaid of his wife; that ſhe was mad, or worſe. From a general note, the huſband's character is ſpoke to as good by all the witneſſes for the defendant.

The jury brought *Coate* and his wife guilty, and *Ewbank* the huſband; and acquitted the reſt, without any great ſtruggle on the part of the proſecutor.

On the part of Mrs. *Mills*. That ſhe was brought to the ſame madhouſe, under pretence of her huſband being arreſted; when ſhe got there, ſhe was cruelly thrown down; when ſhe aſked the place what it was, Mrs. *Coate* ſaid, it was a place for mad bitches, ſuch as you. She called Mrs. *Mills* a d——d infernal b—h. The ſtench, ſuch as made her almoſt retch. They gave her rotten beef; and Mrs. *Coate* ſaid, ſhe was not mad, but a great b——h.

I would ſtate, then, my directions to the jury on this occaſion, as a matter of great public concern.—There is no authority by the law for a private madhouſe. The circumſtances muſt govern therefore. It would be very hard to ſay, that in caſes where a party is unfortunately viſited with this calamity, they ſhould always have their caſe made notorious by a commiſſion under the great ſeal. That every indigent perſon ſhould be neceſſitated to that expenſive remedy, which would ſwallow up all their ſubſtance. In Doctor *Monro*'s caſe, you obſerve, whatever would be done by the moſt
tender

nder huſband or parent, muſt be the treatment; no coercion, no rſhneſs of treatment; nothing but with the beſt view, ſubject the aſſiſtance of the faculty. Whatever is done with any other ew, all unneceſſary ſeverity, all confinement other than for the ſt purpoſe of the unhappy perſon's recovery; will ſubject to a nſure proportionable to the conduct. Here I muſt take notice, at till this time I never heard of a madhouſe, without regular at-ndance by ſome of the faculty; here, Mrs. *Mills* was under tem-orary confinement without any.

The other, be ſhe mad or not, had no phyſic, ſhe declares, ſince e was 17; no pretence ſhe had any given her. Much has been id, and I think on a wrong foundation, of regulating theſe houſes. he law recognizes them not; if we go to regulate them, we eſtaliſh them by law. In Mr. *Wood*'s caſe, Dr. *Monro* was acquit-ed by a ſpecial jury, both here and in *London*; it appearing there, at every thing had been done for the beſt.

Every caſe of this ſort, muſt ſtand the ſtricteſt teſt: It muſt al-ays be ſupported on it's own particular circumſtances. Whatever as been done not compleatly juſtifiable, muſt abide it's fate. What-ver cannot be proved to have been with the beſt motives, let the oers anſwer for in ſuch manner as thoſe ought to do who have aken upon them an act of authority not allowed by the law, and n which neceſſity alone can ſerve for excuſe, and that neceſſity manifeſtly proved.

Lord *Manſfield* obſerved—Of the two huſbands, I think *Mills* much the worſt; my difficulty is, how to puniſh the huſband without ruining the wife.

A ſcheme of a ſeparate maintenance was adopted; eight ſhillings a week propoſed, the ſum the huſband of *Ewbank* allowed in the madhouſe. He pleaded, his having been burnt out ſince, and the expence of ſupporting his child; he offered to pay five ſhillings a week, alledging, he would do his duty to his wife, which he had never refuſed; that he would be very glad if ſhe became fit; that to promiſe more than he could perform would be fraudulent. Lord *Manſfield* obſerved—Mrs. *Eccles* evidence, of the huſband's ſaying he would ſend his wife to a madhouſe, and what was ſaid by the wife, "this is for your ſending a ſheriff and warrant." If we puniſh him with long impriſonment, (his livelihood is by his labour,) we ruin him, his wife and children.

She was deſired, I think, by Mrs. *Eccles*, who has received the approbation of the court for a ſenſible humane woman.

Ewbank was told, the court would be obliged to do what was much againſt their inclination, if he would not undertake.

Mrs. *Read*, on the part of the huſband, conſented to maintain the child, on condition the huſband ſhould undertake to pay ſix ſhillings a week; with liberty to apply to the court, if he ſhould ever be charged with his wife's debts, contracted during her ſeparation.

The huſband was deſired by Lord *Mansfield*, to let his wife ſee her child ſometimes; but, he ſaid, the poverty of his circumſtances would oblige him to ſend his child a hundred or two miles off.

The court ſtays judgment on *Mills*, till his wife thinks fit to complain of him; his condition being ſuch, that he could not be impriſoned without ruin to both. The other three committed till the court ſhould have conſidered the judgment on them.

Preſcription*.

Rex *againſt* Johns.

ON an information in the nature of a *quo warranto*, to ſhew cauſe why he exerciſed the office of mayor of a corporation conſtituted by the charter of Queen *Elizabeth*——Preſcription was pleaded, That from the juſtices of the laſt year for the borough, mayor for the year following is choſen. Objection to the plea, That there can be no preſcription, where evidence is upon record of the creation of an office *vel cujus vis præterea rei*; and that the office of borough-juſtice itſelf was created within time of legal memory; and, it was contended, took place in the time of *Charles* 1ſt. 100 years after the charter: That it cannot be preſcription, nor even uſage; for the charter gave no ſuch power; and an uſage againſt the charter cannot be ſupported, for that every charter implied a negative on every practice contrary to that it grants or permits. In *The King* v. *Philips*, *Strange's Reports*, where a mayor is elected *pro uno anno integro*, without *tantum*, or any other reſtriction added; in that caſe, *Philips* ſet up an uſage from the charter downwards, for holding over in the office; but ſuch uſage was there declared bad. In the caſe of the corporation of *Yarmouth*, a conſtant uſage was pleaded, and proved, of chooſing by the majority of aldermen preſent; though the charter directs, they ſhall be choſen by a majority of the whole number. The uſage was contended, as explanatory of the cuſtom; that this court determined it could not be ſo. That Lord Chief Juſtice *Lee*, in the caſe of the corporation of *Yarmouth*, declared that uſage could not explain a charter [againſt he words;] that the court muſt explain it [according to the words nd meaning;] that the corporation in that caſe pleaded an uſage, to chooſe their mayor from the aldermen: The words of the charter were, to be choſen from the burgeſſes or inhabitants; the conſtruction they put on theſe words, and which they contended was eſtabliſhed by uſage, was, that aldermen being burgeſſes were not excluded from being juſtices.

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* Præſcriptio eſt titulus, ex uſu & tempore ſubſtantiam capiens ab authoritate legis. 1 *Inſt*. 113.

In this caſe the court was of opinion, that the charter did not mean to include aldermen, and therefore the uſage was not admitted*.

Lord *Mansfield* obſerved—Uſage will be good or bad, according to circumſtances; where the words of a charter are equivocal, and it ſtands indifferent how to interpret, contemporary uſage will explain the words†.

King *againſt* Rebot.

IN the caſe of tolls of a light-houſe rated to the poor——The queſtion was, whether it came within the ſtatute 43 *El.* It was ſaid, *Fulham Bridge* was rated at 1000*l.* *per annum*, equally between *Fulham* and *Putney*; that if a maſter ſhould put a ſervant into a light-houſe, he would certainly gain a ſettlement. *Bunbury* 81. there was an opinion, that light-houſes were not of a nature to be ſubject to church-rates. Three judges were of that opinion; but Baron *Price* diſſented. In the caſe in queſtion, the light-houſe was actually uſed as a dwelling-houſe by the defendant; that the annual profit is the meaſure of the value; that 'tis objected, tolls are paid from different parts of the kingdom, and are of very uncertain profit; yet ſtill, 'tis in conſequence of the houſe that they are collected, and the houſe has a local relation to the pariſh of which it is a part; and ſome eſtimate may be made. That in *The King* v. *Corporation of Wickham*, *Hales* was of opinion, a mere toll was liable. Cellars, warehouſes, corn-mills, ever were and are liable. Much ſtronger this: That *Ranelagh-houſe* would let at about 100*l.* *per annum*; but on account of the money it brings, is rated vaſtly higher. That there might be a queſtion, whether heriots and ſuch property were rateable; which may not ariſe within the year. But here is an houſe, lands, and annual profits; and as to the degree in which they ſhould be rated, an appeal to the quarter-ſeſſions would decide that.

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* Conſuetudo non præjudicat veritati.

† Contemporanea expoſitio eſt optima interpres legum conſuetudo.

On the other ſide, that the juſtices of *Harwich* were all intereſted, it being a local juriſdiction; ſecondly, there was reaſon enough to ſet aſide the order, becauſe they had taken in the duties, and had ſaid ſo, in effect, in their order; for they rate a little building of no value but as a light-houſe, and ſcarce ten yards of ground, as bringing in 1400 *l. per annum*. Thirdly, The toll is collected of ſhips paſſing by, not coming in. That there are about twelve ſuch light-houſes in the kingdom, and the attempt is unprecedented: That this had been compared to the caſe of a ſhop, on the other ſide; but whoever heard the profits of a ſhop rated? Mr. *Manſfield* added, that this was to be conſidered as the profits of an office: And that in the caſe of *The King* v. *Shallfield*, it had been determined, the profits of an office were not liable. Now, here the office belongs to the crown, as of duty, for the preſervation of the kingdom; and the crown neceſſarily delegates that truſt to perſons who are to ſupport the houſe, keep up the lights, and execute the other neceſſary concerns, and to have the profits in recompence. Mills are rated as houſes inhabited by the miller and his ſervants, and not in reſpect of the toll. Lead mines are not rateable. Stalls in a market not rateable to the poor. *Vide Roll's Abr.*

His Lordſhip was deſirous it ſhould ſtand over; but expreſſed his preſent opinion, they were not rateable: *Et poſtea*, in the ſame term, his Lordſhip delivered the opinion of the court.

Lord *Manſfield*—We are all of opinion, that the tolls being raiſed all over the kingdom from veſſels from different parts, are not to be conſidered as locally related to the pariſh: And they have expreſsly rated the toll, and not the houſe. Has any body enquired of *Putney Bridge*, for I am informed that the attempt failed? However, it matters not as to this caſe.

Coate, the Keeper of the Madhouſe, and his Wife, brought up to Judgment.

PROPOSED by the court, That they ſhould pay 50*l.* of which the one moiety to be placed in the hands of Mrs. *Eccles*, for the benefit of Mrs. *Ewbank*; and the other to be in the hands of a truſtee. Mrs. *Mills* propoſed Alderman *Harley*. Lord *Manſfield* ſaid, he would ſpeak to him upon, and would take care that her huſband ſhould not meddle. The rule was accordingly, that *Coate* ſhould pay coſts of the proſecution, and 50*l.* into the hands of Alderman *Harley*, for the ſupport of Mrs. *Mills*; 50*l.* to Mrs. *Eccles*, for the ſupport of Mrs. *Ewbank*.

The Court ſet a fine of 6*s.* 8*d.*

Lord *Mansfield* obſerved, That it was proper perſons who kept heſe houſes ſhould be taught, by this example, what had been arneſtly repeated to them before; “ that the circumſtances of the caſe alone could ſupport their act.” That they were not to take a wife, ecauſe her huſband ſaid ſhe was mad; nor an huſband, becauſe his vife. That the opinion of an able phyſician, on view of the party, nd on his examination into the caſe, would be the only proper uide: And that every thing muſt appear ſtrictly, with all diligence nd due advice, to be done for the beſt.

Apprentices.

ON a caſe of binding out apprentices by churchwardens, as under the ſtatute of 39 *Eliz. c.* 3. *ſect.* 3. It came before the ourt on an order of ſeſſions.

The churchwardens bound out the child to a perſon of another pariſh.

Minchard, cited from *Salkeld*; *ſtat.* 8 & 9 King *William*, cited; ſtatute of Queen *Ann*, cited.

Argued, That the ſtatute of *Elizabeth* ſaith, that the churchwardens may put out children to whom they ſee convenient; and are the words “ within the pariſh” to be ſupplied?

On the other ſide it was obſerved, in the caſe of *Salkeld*, cited above, the judgment was on account of the particular time the child was bound out.

Lord *Mansfield*—This ought to have been made a ſpecial caſe; and the perſon not receiving ſhould be indicted, that it may come before the court in that way; it not appearing on the order, whether the juſtices made it on the matter of law, or inſufficiency of the perſon to whom they bound the child. His Lordſhip obſerved, there had been a caſe two or three terms ago, where a perſon, to whom the child was bound, had an houſe within the pariſh, [but not reſident there.]

It was ſuggeſted by counſel, The ſeſſions had determined, though not ſpecified in their order, on the point of law. That apprentices could not be bound out to an houſekeeper of another pariſh; though ſuch houſekeeper was an occupier of lands within the pariſh belonging to the churchwardens ſo binding out.

This came before the court ſo, that Lord *Manſfield* had not an opportunity of delivering an opinion judicially; but he obſerved, as a private opinion, that he thought if the juſtices did determine on that ground, they did very right.

Mr. Juſtice *Aſton*, was of the ſame opinion: And obſerved, how hard it might be to bind an apprentice on a perſon occupying lands in one pariſh and being a houſekeeper in a very diſtant one.

Bankrupt.

LORD *Manſfield* expreſſed a doubt, whether a bankrupt could demand inſpection of the proceedings under a commiſſion, in order to litigate them. On conſulting concerning the practice, it appeared, that ſuch inſpection was never permitted in a caſe where the bankrupt litigated an act of bankruptcy.—It was compared with inſpection of a record. But Lord *Manſfield* ſaid, if the truth was with them, they did not want inſpection; but that the uſe of it would be, that they might make evidence, by ſeeing where the evidence preſſed. Lord *Manſfield* ſaid, the court would order, for aſking, that the clerk of the commiſſion ſhould attend with the proceedings at the trial.

It ſeemed agreed by the court, that a creditor might demand inſpection of the proceedings.

Horam *againſt* Humfreys.

Action on a Promiſe of Marriage.

THE cauſe was tried by Mr. Juſtice *Aſton*. The damages were laid at 5000*l.* and the promiſe was proved, and procuring of a licence by the defendant. The judge repreſented to the jury the nature of the action; the injury of fixing a young woman's affections, and then trifling and flying off, after a ſolemn deliberate engagement, ſo far advanced; and the prejudice it might be to her in future life: That they ſhould give ſuch damages as the circumſtances in evidence, either aggravating or extenuating, ſhould require; and that the rank and condition of the parties would be to be conſidered. And that he could not help obſerving, that the fortune of the defendant had not been given in evidence, though the damages were ſet, in a vague manner certainly, at 5000 *l.* that they would regulate their damages, therefore, from what from his buſineſs he might appear; and any ability they might have to judge of his ſubſtance. The jury gave 500*l.* damages. Mr. *Horam*, the father of the plaintiff, had a place in the board of works, and the defendant appeared to be a pawnbroker.

Nuncupative Wills.

PROOF of them in the Prerogative-Court at Doctors Commons.

Execution.

SHERIFF liable to the acts of his officer acting under colour of his warrant.

Executor.

THE will itſelf, before probate, is ſufficient title for the executor to the goods of the deceaſed, as to his property as executor; the probate being only neceſſary to enable him to ſue for debts due to the teſtator.

Simſon *againſt* Tuck.

ON an action to recover penalties, on the ſtatute 13 *G.* 2. for running a gelding not his own property, of the value of 20*l.*

Another penalty for running a gelding for leſs than 50*l.* Penalty 200*l.* on both taken together.

The counſel for the proſecution—That the act was intended to diſcourage petty matches amongſt the lower people, and to improve the breed of horſes. They called witneſſes to ſupport their caſe.

It was argued for the defendant, that upon the preamble of the act it appeared, that "whereas idleneſs among the common people is encouraged by races for ſmall ſums, be it enacted," *&c.* and that the worſt of all idlers are common informers; but that ſince the law ſupported information of this kind, they were only deſired not to aſſiſt the charge unleſs they found it plainly evidenced.

Witneſſes were called on the other ſide.

Lord *Mansfield* left it to the jury; obſerving, that the value of the geldings was not at all proved, which was a leading point. That the queſtion turned upon what horſes were entered for the ſaddle, and that if they believed they entered for the ſaddle, and then run to have the ſaddle for forty ſhillings, it would be the ſame as if they ran for the ſaddle. That one of the witneſſes ſaid they did not run for the ſaddle; that the jury would judge of the weight of probability, for if true, then the evidence did not ſupport the count.

That on the part of the defendant it was ſaid, that the father did not run the horſe; that it was quite without his privity; that this was peremptorily ſworn, and a full defence if true. His Lordſhip obſerved ſome circumſtances in corroboration; which if they believed, they would find for the defendant; if not, the offence was grievouſly aggravated: It was perjury to avoid a penalty fixed by the law, on which the queſtion upon the facts aroſe. That he doubted not they would find a proper verdict.

Jury found for the defendant.

Miſnomer.

PLEA againſt an action for miſnomer of the defendant's chriſtian name, *Clariſſa*, when it was *Clara Elizabeth*; but having put in bail in the name of *Clariſſa*, ſhe was precluded from that plea.

Blackwell *againſt* Green.

ON information againſt the defendant, maſter of an hackney-coach, for endeavouring to drive over him, and ſtriking him.

After judgment by default, they would have read affidavits in denial of the fact.

Court—They can't controvert the fact after ſuffering judgment to go by default; they muſt pay coſts.

Partnerſhip.

EVERY partner is liable jointly and ſeverally.

Settling of Caſes.

LORD *Mansfield* ſaid, he uſed to obſerve caſes were uſually reſerved and hung over often four or five years. That it was the cuſtom formerly for judges to have caſes argued at their own chambers. That he never ſuffered a caſe to be reſerved for him to ſettle; and always took care to have one caſe ſettled, before the next

ext came on: And now, he added, I believe it's the conſtant ractice, and I will not permit that practice to be broken in upon.

On an application, that an alteration might be made in the ſetling a caſe, which had been already drawn up and ſigned by the ounſel——

Lord *Mansfield*—In this caſe the jury having found their verdict, nd the caſe drawn and ſettled, we cannot now alter it nor can I ermit it. *As it was ſettled in the preſence of the jury it muſt ſtand.*

Stow *againſt* Drinkwater.

Chattels in auter Droit.

IF a feme-ſole be poſſeſſor of chattels in *auter droit* as executrix, and after intermarry, the law maketh no gift thereof to er huſband though he ſurvive her.

A caſe was mentioned by the court, in which the huſband had poſſeſſion as being *prochein ami*. *Vide* 3 *Mod.* 58—9.

Putting off Caſes by Conſent.

LORD *Mansfield*—The order of the court, which confines to four days, would be entirely evaded, if putting off by conſent, without good cauſe ſpecified, were allowed. I remember a caſe when I came into court, the famous caſe of *Robinſon*, *which had been put off by conſent twenty-three terms.*

Return of a Sheriff to a Special Capias.

RETURN *non eſt inventus infra balliv'*; but the names of the ſheriffs in the return were *Oliver* and *Bull*, one a ſheriff of the laſt year, the other of the preſent.

Motion for an attachment for the falſe return.

Rule granted: But the court deſired they would give notice to the parties before they took them, that they might appear in court, and, if it was a miſtake, ſhew it.

Davenport *againſt* Tyrell.

A Writ of error on a judgment in the King's Bench in *Ireland*, 9 *G.* 3. The judgment was given upon a bill of exceptions tendered below. Lord *Mansfield* declared the opinion of the court, that the court below was wrong, in giving judgment on a bill of exceptions; but that they had given judgment, independent of the bill of exceptions, as they ought to have. And added, We cannot reverſe it for the informality.

It was on a queſtion of the right of holding office as mayor, in which there were two iſſues; one of which was, whether duly elected; the other, whether he had taken the ſacrament in due time. And on the ſecond iſſue, they did not find that he had taken the ſacrament, but only the oath; whereon judgment was given againſt him, and that judgment affirmed.

Notice of Indictment.

Queſtion on the 14 G. 2. c. 17.

NOTICE on the 20th *July*; commiſſion-day on the 29th; before the 14 *G.* 2. fourteen days notice was always to be given; on which account it was contended, that the ten days muſt be excluſive of the day of notice. But the court did not affirm nor controvert that point, it not coming directly under conſideration.

Execution levied by an Attorney after Notice of the Debt ſatisfied.

JUDGMENT, That the attorney reſtore the goods in execution; pay the coſts of execution, and the coſts of the action.

Conviction.

THE conviction of return of a pauper from the place to which he has been legally removed, muſt be by confeſſion, or oath, or view of the juſtice himſelf; and the return muſt be without certificate, to make the conviction good.

Vagabond

Vagabond.

JUSTICE, by 13 & 14 *Car.* 2. may commit a vagabond to the watch-houſe, to hard labour for a month, or to the next ſeſſions.

Commitment.

NO ſupporting one on the ſtatute *G.* 2. for returning, without the return certified in the commitment.

Affidavit of Debt.

A. Maketh, that *B.* is indebted in a certain ſum, then the jurat ſigned. Affidavit ſufficient, it being under peril of perjury if not true, though the word oath omitted. *Quod nota.*

Bennet's Caſe.

DEED of covenant in conſideration of marriage. Eſtate for life, to the huſband and wife. Covenant to renew leaſes as long as the huſband and wife ſhould live, for the benefit of the iſſue male; and on default of ſuch iſſue, for the iſſue female of their two bodies: And in caſe any of *ceſtui que vie's* did become ſick or infirm, the huſband and wife being two of them, the huſband ſhould renew ſuch leaſe or leaſes.

The queſtion was, Whether after the death of the huſband it was not the intent of the deed, the executor ſhould renew; and if the executor ſhould renew, then whether, as he had once renewed, the intention were not thereby ſatisfied; his executors, heirs or aſſigns not being mentioned? *Siderf.* 151. was cited.

It was contended, That if the executor, and his executors or aſſigns, were not to renew, the proviſion would be nugatory; the leaſes muſt be full at the time the iſſue is to take.

It was further argued, That the executor was to renew out of the perſonal eſtate, and not out of the ſurplus of the real.

On the other hand it was argued, That the intention certainly would be executed here, if made out, as well as in a court of equity; but that the intention was otherwiſe.

Further, That it was ſaid expreſsly in the deed, the remainder of the term was what the heir was to have. In *Siderſin*, the caſe was, *A.* covenants to give *B.* 20 *l.* a year; this was contended to be only a gift of a ſingle 20 *l.* for one year: But there, the evident conſtruction could not be ſuch as was contended; but here, a leaſe has been renewed, which is all the words or reaſonable intendment require.

To this it was objected, in replication, That not the words only, but the intention of the parties, and the intereſt they had, the objects they had in view at the time, were principally to be regarded. That every deed is to be conſtrued in favour of the purchaſers; that even the words "ſuch leaſe or leaſes" were directly convincing.

Lord *Mansfield*—This is a caſe of a marriage-ſettlement. The huſband, being poſſeſſed of a church-leaſe, covenants to ſurrender in ſix months from the marriage, and purchaſe a new leaſe, in which the wife was to be one of the *ceſtui que vie's*; becauſe ſhe was to be ſure the leaſe ſhould not determine during her life. It's ſaid, that the word "either," which properly is between two, ſignifies only, that when one of the firſt leſſees dies, another is to be put in. This will not anſwer the following words, "leaſe or "leaſes." Beſides, expreſsly, *Ethelred*, the wife's name, is always by the covenant, to be continued during her life: This ſuppoſes poſſibility of more than one removal. If but one, the heir migh have nothing but only the ſurplus of the profits.

I conſtrue, That the heir in the deed of *Thomas Bennet* the father, was to have a full leaſe.

'Tis not uſual to give an opinion, in a caſe coming out of Chancery; but in this I do, and ſhall direct the certificate accordingly.

Richardſon *againſt* Fen.

On a Plea of Non aſſumpſit infra ſex Annos.

Plea of non aſſumpſit infra ſex annos. Any the ſlighteſt acknowledgment would take it out of the ſtatute.

THE defendant pleaded the ſtatute of limitations, *non aſſumpſit infra ſex annos*. Evidence, it ſeems, came out on the trial, that he met a man in a fair, and ſaid he went to the fair to avoid the plaintiff, to whom he was indebted. This was within the ſix years, and was held a ſufficient *aſſumpſit* to take it out of the ſtatute, there being no other debt between them; and thereupon the jury found for the plaintiff.

On a motion for a new trial——

Lord *Mansfield*—A very little would take it out of the ſtatute of *on aſſumpſit*. In a caſe of Lord *Barrymore*, *A.* ſaid to *B.* You are ndebted to me ſo and ſo; *B.* ſaid, No; but we will ſettle the account. This acknowledgment of an account to ſettle between them, was held to take it out of the ſtatute.

Wheatly *againſt* Edwards.

ACTION of criminal converſation; the jury had found for the plaintiff. On a motion for a new trial, there was ſtrong evidence of perjury in the witneſſes to the criminal converſation, on expreſs teſtimony againſt them.

The plaintiff had ſworn before an attempt of the defendant to commit a rape on his wife; and afterwards an actual commiſſion by *Edwards* the defendant; the jury brought in their bill ignoramus.

After this, the defendant brought an action againſt the plaintiff in this cauſe, for a malicious conſpiracy, and recovered 300*l.* damages.

After this the huſband brought his action againſt the defendant, for criminal converſation, and ſucceeded.

There were ſtrong circumſtances in proof of the charge; amongſt others, the plaintiff's own mother ſwearing it, and the expreſs and poſitive teſtimony of the witneſſes to the fact. On the other hand it was remarkable, that the mother ſhould have mentioned nothing of this to her ſon, till a long time after; but for this ſhe accounted, by ſaying, as Lord *Mansfield* obſerved, that her ſon knew enough already; and had ſufficiently ſuffered by his wife's elopement. There was great improbability, too, that men, who appear to have been utter ſtrangers and not apprized or ſuſpecting, ſhould come preciſely in time, and be ocular witneſſes of the act; and this, I think, in noon-day, in the huſband's houſe, and the door not faſtened. And that the huſband himſelf ſhould ſwear firſt to an attempt of force; then to actual force; and then to voluntary familiarity of his wife with the ſame man. This and other circumſtances Lord *Mansfield* particularly obſerved. There was direct teſtimony of ſubornation of perjury, by the plaintiff's conſent, of the witneſſes; and this in different places, and by three different witneſſes. On the other ſide, four perſons ſwore to the character of one of the witneſſes, who was living, and who ſwore the other was dead, and that he had ſeen him in his coffin; and yet there was a witneſs who ſwore on affidavit that this man was alive.

Lord *Mansfield* pronounced, That there appeared no ground on the evidence for granting a new trial; but that they might proceed by indicting the witneſſes for perjury. *Note*—In the caſe of *Chapman*, there is farther notice taken what was the event of that indictment, and the conſequences thereon. *Vide infra.*

Bail.

BY a late rule of the court, bail not preſent at the firſt ſitting of the court muſt wait till the riſing.

Golightly *againſt* Reynolds.

Of trover.
Vide 3 Blackſtone 152. 8vo. edit.
Cro. Eliz. 434—5. 219, 485, 495, 638, 723, 824, 870, 883.
Salk. 655, 666, 667.
4 Bur. 1. p. 31.
4 Bur. 1363.

ACTION of trover upon the following caſe: Action brought for ſix ſilver table-ſpoons, two ſilver ſalts, two ſilver ſalt-ſpoons, one bank-note of 20*l.* No. 203, dated 19th *November* 1771, and ten guineas in gold; all which were the produce of a bank-note of 50*l.* ſtolen by one *Ferguſon*, found on him when taken up, and produced in evidence at the *Old Baily* by the plaintiff, the proſecutor, at the trial of the ſaid *Ferguſon*, who was convicted of the theft of the ſaid bank-note of 50*l.*

Before the action was brought, all the ſaid table-ſpoons, ſalts, and ſalt-ſpoons, and the ſaid bank-note of 20*l.* and the ſaid ten guineas in gold, were demanded by the plaintiff from the defendant, who had them in his cuſtody, and refuſed to deliver them.

The queſtion is, whether the plaintiff can recover in this action?

Signed { EDWARD BEARCROFT, for defendant.
THOMAS DAVENPORT, for plaintiff.

(Copy of the original caſe laid before the judges.)

For the plaintiff it was argued, that till the 21 *H.* 8. *c.* 11. Reſtitution was not, except in appeal; but that act gives reſtitution on indictment as well as appeal. It gives indeed, a particular mode; that juſtices of gaol-delivery, or other juſtices before whom ſuch felon ſhall be found guilty, ſhall give ſuch remedy by writ of reſtitution, as by appeal; not excluding, 'tis apprehended, any other mode.

That *Hawk. Pl. Cro.* ſays, there is a mode of recovery when the goods demanded were not ſtolen from the plaintiff; when the appellee hath diſpoſed of the things ſtolen, the appellant hath a ht to what the things ſtolen were diſpoſed of for; and that now law was the ſame in that caſe. And ſo was the caſe of gold len, and changed into ſilver, *Cro. El.* 661. and cattle ſtolen, d ſold in open market, *Noy* 128.

That was this action of trover not to be good, another action nnot be well conceived. Detinue would not do properly, as be- g rather for the things themſelves. Trover ſuppoſes an innocent ding; but yet a wrong in the refuſal of reſtitution: which applies ciſely to the caſe.

On the other ſide, That on conſideration what the nature of an peal is, the plaintiff has not here a writ of reſtitution. It is given an appeal, as an encouragement to proſecute to conviction; and is to recover the ſpecific thing. Where the proceedings are to reco- r ſpecific goods, the form is exact. If an appeal be to recover a ſpe- fic thing, one ſhould expect the form would be accordingly; and fact, an appeal, by the form, gives the recovery of the very things olen: And even if any thing ſtolen be omitted, it cannot be reco- red.

That if the court ſhould think the argument too ſtrong, at leaſt e defendant was excuſable, acting under great authorities, in bring- g the caſe before the court.

That trover was inſufficient, when the party was taken, and the ods ſeized, on behalf of the crown, by the proper officers. That en, the plaintiff could only recover by judgment of appeal: That is would be the caſe, if the action was brought for the very goods. hat if the authorities of law, cited by Mr. *Bearcroft*, on the other de, were too ſtrong to be contradicted, and an action would lie, ithout the neceſſity of bringing an appeal, yet that this was not e proper action; and that the propriety of law gave detinue, not over: For that, to maintain trover, you muſt ſtate, and be able to rove, that the party was poſſeſſed of theſe goods, and accidentally ſt theſe goods; and that the defendant found them, and refuſed to ſtore. If you never had the poſſeſſion of the goods, you fail in e ground of trover.

That this benefit is to be had as in judgment on appeal by the ward of judges of oyer and terminer. But in this caſe, there be- g a doubt in the learned judges, whether ſuch benefit can be ad- iniſtred here, the proper court is miſtaken; the remedy is not ere. That Mr. *Reynolds* acted under a ſpecial truſt, under obligation f office, and would be unjuſtifiable by delivery of them, without pro- er authority; that the writ of reſtitution is founded on improper detention; that as to this action, at leaſt, of trover, it ought not to be maintained.

The judge who tried the felon ſaid, that, on the conviction, Mr. *Reynolds* declared he ſhould make no difficulty of the matter; and ſeemed then willing not to conteſt the reſtitution. The writ of reſtitution was contended as a neceſſary and deciſive remedy. To which it was anſwered, they might plead to the writ of reſtitution, ſo that it was not immediately deciſive.

Lord *Mansfield*—It would be the hardeſt prerogative poſſible, if an innocent party ſhould loſe his goods to the crown, becauſe a felon had taken them away. There is very great reaſon why, before proſecution, to avoid compoſition of the felony, trover ſhould not be brought. There is no queſtion, therefore, but ſome way, and to ſome extent, a plaintiff is entitled to reſtitution. But how are we to conſtrue the reſtitution which ſhould be made? Narrowly, for the very thing ſtolen? No: Liberally, againſt ſo odious a prerogative.

Vide 3 Inſt. 242. b.

Title Reſtitution, pl. 22.

Brooke cites the 7 *E.* 2. where it was agreed by the judges of the King's Bench, and by thoſe of the Common Pleas, that in appeal for money taken *felonice*, reſtitution ſhall be where no property is known.

I don't ſee why trover is not good.—The ſtatute puts an indictment in the ſame caſe as a writ of appeal. The ſtatute ſays, it ſhall be reſtored; but leaves the party to his own way of recovery.—Since this ſtatute, it gives him a particular remedy, but does not take away his other remedy.

Vide Cro. Eliz. 278. of Reſtitution, and 638. Vide etiam, 661, which ſpeaks expreſsly to the point of this caſe.

I don't believe there has been a writ of reſtitution theſe two hundred years. The caſe has been adjudged already, in former caſes; as in *Noy* and *Cro. Eliz.* very rightly before, in favour of natural juſtice, againſt the rigour of the forfeiture.

Mr. Juſtice *Aſton*—*Croke* ſays, and this has greateſt weight, as a cotemporary expoſition, that in his time ſuch recovery of goods was common at *Newgate*. He means, the *Old Bailey*.

Vide Burn, title Reſtitution of ſtolen goods, vol. 3, p. 194, 4to edit.

Burn, a very judicious writer, takes it to be within the ſtatute of *H.* 8.

Judgment for the plaintiff.

Note, The words of the ſtatute *H.* 8. are, "Be it enacted by this preſent parliament, that if any felon or felons hereafter do rob or take away any money, goods, or chattels, from any of the king's ſubjects—from their perſon, or otherwiſe, within this realm; and thereof the ſaid felon or felons be indicted, and after arraigned of the ſame felony, and found guilty thereof, or otherwiſe attainted, by reaſon of evidence given by the party ſo robbed, or owner of the ſaid money, goods or chattels, or by any other by their procurement, that then the party ſo robbed, or owner, ſhall be reſtored to his ſaid money, goods and chattels; and that as well the juſtices of gaol-delivery, as other juſtices before whom any ſuch felon or felons ſhall be found guilty, or otherwiſe attainted, by reaſon of evidence given by the party ſo robbed, or owner, or by any other by their procurement, have power, by this preſent act, to award, from time to time, writs of reſtitution for the ſaid money, goods and chattels, *in like manner as though any ſuch felon or felons were attainted at the ſuit of the party in appeal.*"

Vide 5 *Co.* 110. *Viner*'s Abridgment, p. 156. title Reſtitution; and *Kelyng*. 49.

Foxley's caſe.

I do not find a writ of reſtitution, directed to the ſheriff, though a friend has mentioned one; but I find a writ of reſtitution to the bailiff of a liberty; which, *mutatis mutandis*, as to that circumſtance, I conclude muſt be the ſame. I ſhall copy it *verbatim* from the *Theſaurus Brevium*. It is thus:

Writ of Reſtitution to the Bailiff of a Liberty, in an Appeal of Robbery.

Theſ. Brev.

Rex, &c. W. A. *ballivo prioris domus, de* C. *&c. cum* R. T. *nuper in curia noſtra coram nobis appellaverit* T. A. *de, &c. de eo, quod idem* T. *unam burſam, &c.* (*recitando omnia bona ut in appello*) ad valentiam 40 l. de bon. et catt. *præd.* R. & 16 l. *in pecun. numerat. de denar. prædicti* R. *apud* W. *in com.* M. *invent. felonice furat. fuiſſet, cepiſſet, et aſportaviſſet, contra pacem noſtram, unde præd.* T. *per quandam jur. patrie inde inter eos capt. convict. eſt. Et pro eo quod invent. eſt per eand. jurat. quod idem* T. *ad recent. proſecut. dicti* R *capt. fuit, ſicut nobis conſtat de record. Conſ. fuit in eadem curiâ noſtrâ, coram nobis, quod præd.* R. *rehabeat* bona, catt. et denarios ſuos præd. *ac jam ex parte præd.* R. *in curia noſtra coram nobis accepimus, quod bona, catt. et denar. præd. ad manus tuas, 6 die, &c. ult. præterit. tent. apud* G. *præd. devenerunt**. *Ideo tibi præcipi-*

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* So the copy; but I preſume it will be found thus: In curia noſtra, coram nobis, 6 die, &c. ult. præterit. tent. apud G. accepimus quod bona, catt. et denar. præd. ad manus tuas devenerunt; and ſo I have tranſlated.

mus quod eidem R. *plenam reſtitution. eorundem bonor. catt. et denar. ſine dilat. habere facias. Et qualit. hoc breve noſtrum fuerit execut. nobis, apud* Weſtm *die, &c. conſt. fac. hoc breve noſtrum nobis remitten. T. &c.* *

The

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* It is ſubmitted to the learned, whether by this writ of reſtitution the bailiff, or ſheriff when ſerved on him, was not on the face of it empowered to reſtore in value, in caſe the goods were loſt? The appellant, for certainty, was obliged to ſpecify all the goods on his appeal; and this writ purſues the declaration, and commands reſtitution of the ſame goods, in like manner ſpecifying them: So that if the goods were to be had, I apprehend the ſheriff could not give the value inſtead of them; nor the appellant demand the value; but the very goods were to be reſtored: And if he had omitted any in his appeal, he could not have reſtitution of them awarded by this writ; for the writ could not contain other goods beſides thoſe in the appeal. If, however, the goods were loſt or deſtroyed by any unavoidable accident, the value of them is ſpecified in the writ.

Is not this a direction to the ſheriff in that caſe, that he may know what he is to reſtore, in lieu of the goods loſt or deſtroyed; and the appellant may know what he is to receive?

And might not the ſheriff have returned, That ſince the iſſuing of the writ, and before it came to his hands, the goods were deſtroyed by fire, or ſtolen by houſebreakers, or the like; and therefore, that he had made full reſtitution thereof in value, according as the value of the ſame was expreſſed in the writ?

Would it not have been ſtrange, when the goods were in the cuſtody of the law, that the appellant, after the expence of proſecution, ſhould loſe all benefit of the writ, only becauſe they were deſtroyed, loſt, or periſhed, without his fault? Suppoſe they were in their own nature periſhable, and not capable of keeping; as dead fowls, or the like?

Suppoſe the very caſe here, that they had been changed by the felon before conviction; might not the writ, which expreſſes the value, have then been adapted to the caſe, and have directed the value to be given, when nothing elſe could be given? Does not the reaſon given by Lord Coke fail, if the party had omitted in his appeal to recite the goods ſtolen, the felon might have eſcaped conviction; and the writ of reſtitution ſhall not give him more than he has recited in his appeal, becauſe he ſhould be puniſhed for his neglect? But if the identical ſubjects of the appeal are gone without his fault, then may not the writ of reſtitution give him the value; or may it only recite what is not, and do nothing for him, when he has done all that the law requires? Surely, if it expreſſes the value, even when the goods remain, it does not this for nought; and a multo fortiori it will give a ſuitable remedy, when the goods were gone before the appellant could be entitled to the writ.

In Plowden's admirable Commentaries, there is a diſſertation on equity of interpretation of ſtatutes—Eyſton *againſt* Studde; at the end of the caſe, among other caſes, this is put. By the ſtatute 1 E. If a man, dog or cat eſcape out of the ſhip, neither the ſhip nor any thing in it ſhall be eſteemed a wreck; [and note the equity of interpretation extends this to any other creatures,] the ſheriff is to ſave all the goods he can, and keep them for a year and a day: That if the owner claim them within that time, and make his title, they may be reſtored to him; if not, they are the King's, a price being ſet upon them by the ſheriff and corporation. And they are to be ſent back to the ville or town where they are found, that it may be known what is the King's. And if the ſheriff be convicted of do-

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The King, *&c.* to *W. A.* bailiff of the prior of the houſe of *C. &c.* Whereas *R. F.* late in our court before us, hath appealed *T. A.* of,

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ing otherwiſe, he is to be impriſoned during the King's pleaſure and to pay damages. Now, ſuppoſe the goods were freſh meat or fiſh, apples, or oranges, or any thing which would not keep, and the ſheriff ſells them, and depoſits the money in the vill or town; by the letter he ſhould be impriſoned, but by the ſpirit and equity he hath done well; he ſhall not be puniſhed, he hath fulfilled the law.

I do not mean theſe obſervations to confirm the judgment, which perhaps were actum agere; and it ſtands on a better ground; but as the writ is uncommon, and little known, I hope I may be excuſed for tranſcribing it, and hinting the correſpondence it ſeems to have with the judgment.

In Tremaine's Pleas of the Crown there is a writ of reſtitution, on the very ſtatute of 21 *H.* 8. which has been pointed to me.

The caſe is, Burges v. Coney: The writs runs in hæc verba——

Midd. ſſ. Dominus Rex mandavit Edwardo Coney breve ſuum, in hæc verba: ſſ. Gulielmus tertius Dei gra. Anglie, Scotie, Francie et Hibernie Rex, fidei defenſor, &c. Edwardo Coney ſalutem. Cum ad iſtam delib'ationem gaole noſtre de Newgate, tent' pro com. Midd. apud Juſtice Hall in le Old Bailey, in ſuburbiis civit. London. die Mercur. ſcilicet, 9 die Decembris, anno regni noſtri octavo coram Edwardo Clarke mil. major. civit. London. Georgio Treby mil. capital. juſtic. noſtro de banco, et al. ſociis ſuis juſticiar. noſtris ad gaol. noſtrum de priſonar. in eadem exiſtent. delib'and. aſſignatis ad recentem proſecution. Johannis Burges ſen. quidam Thomas Barnes, nup. de paroch. de Enfeild, in com. Mid. labourer, convict. exiſtit de eo quod ipſe 28 die Auguſti, anno regni noſtri octavo, apud paroch. præd. in com. præd. tres juvencas, Angl. three heifers, color. red pied, p'tii cujuſlibet earum 3 l. 5 s. et un. al. juvencam, Angl. one heifer, color. black, p'tii 3 l. 5 s. de bonis et catal. cujuſdam Johannis Burges ſen. adtunc et ibidem exiſten. invent. adtunc et ibidem felonice furat. fuit cepit et effugavit, contra pacem noſtram coron. et dignitat. noſtras prout per record. inde plenius liquet et apparet. cumque ex inſinuatione præd. Johannis Burges jam accepimus quod ſeparal. juvenc. bon. et catall. præd. ad manus tuas devener. et in cuſtod. tua jam exiſt. Nos igitur volentes p'fat. J. Burges fieri quod eſt juſtum et rationi conſonan. tibi precipimus firmit. injungend. quod juvencas bon. et catall. præd. vel. tal. eor. qual. ad manus tuas unquam devener. ſeu jam exiſtunt prefat. J. Burges ſine dilatione reſtituas et delib'es juxta formam ſtatut. in hujuſmodi caſu edit et proviſ. vel quod tu ipſe ſis coram juſtic. noſtris ad gaol. noſtram de Newgate, de priſon. in eadem exiſten. delib'and. aſſign. ad prox. delib'ation. gaole noſtre præd. ſſ. com. Midd. tenend. apud Juſtice Hall, præd. die Veneris, ſcilicet, 15 die Januar. nunc prox futur. oſtenſur. quare id facere noluiſti vel non potuiſti et ulter. ad faciend. quod curia noſtra in ea parte ulterius conſideraverit; et habeas ibi tunc hoc breve.

Et præd. E Clarke milit. major. civit. London. præd. apud Juſtice Hall præd. 9 die Decembris, anno regni noſtri octavo. Harcourt 315 Tremaine.

I have been reminded, that the writ of reſtitution, ſaying ad valentiam, does it not to enable the ſheriff to reſtore the value; but only becauſe the appeal, or indictment, muſt recite the value,—that it may appear, whether the offence is grand or petty larceny. I believe in highway robberies, and burglaries, the indictment recites the value; though a penny there, is as much capital felony as an hundred pound. But, ſince the reciting the value in the indictment is held to be of ſome uſe, towards aſcertaining the degree of the crime, or for other reaſons, of, *&c.* and that the ſaid *T.* one purſe, *&c.* (here recite all the goods as in appeal) *to the value of* 40*l.* of the goods and chattels of the ſaid *R.* and 16*l.* in money, of the money of the ſaid *R.* at *W.* in the county of *M. feloniouſly ſtole, took and carried* away againſt our peace; whereupon the ſaid *T.* by a certain jury of the county thereon between them taken, was convicted: And whereas it is found by the jury, that the ſaid *T. at the freſh ſuit of the ſaid R. was taken* as to us appeareth of record. It was conſidered in the ſame our court before us, that the ſaid *R.* have again *his goods and chattels aforeſaid.*

And now on the part of the ſaid *R.* in our court holden before us on the 6th day of *April* laſt paſt, at *G. &c.* we have been informed, that the goods, chattels and money aforeſaid, have come to your hands. Therefore we command you, that to the ſaid *R.* you cauſe full reſtitution to be made of the *ſaid goods, chattels and money* without delay. And how you ſhall have executed this our writ, you ſhall make appear before us by the return of this our writ. Witneſs ourſelf, *&c.*

Arminer's

ſons, why may not the ſame value, recited in a writ of reſtitution, be of uſe in favour of the proſecutor; for whoſe benefit the ſame remedy is given on indictment, which before could only be had, and that with greater difficulty and circuity, on appeal? And perhaps the value is not recited in indictments ſimply to ſhew whether felony or not felony; ſince in ſome inſtances it's felony independent of the value: but it may be to enable the crown to give relief, in caſe the goods are changed between indictment and this writ; or, if not originally intended, the general equity of the caſe, perhaps, may attach to it. Becauſe the laws favour reſtitution. And by 6 Rep. 60, where Popham 191. is cited, this ſtatute extends to executors, though not named: and it ſhould ſeem greater reaſon that the ſheriff ſhould reſtore in value to the party himſelf, where the goods are loſt. And if the ſheriff ought to reſtore in value, on a writ of reſtitution; in that caſe, then the party may recover againſt the ſheriff when he refuſes to reſtore, which was the principal caſe.

Note alſo, The judgment in detinue is for the thing; or if that be not reſtored, then to enquire the value. Vide Raſtell's Entries, 218. title Detinue, pl. Judgment, ſec. 4.

In Raſtell's Entries, title Appeal, pl. Reſtitution, 1, 2, 3, 4, 5, 6, 7. you may find writs of reſtitution in various caſes, but without the words ad valentiam in general: in one of them there is, which is after verdict. However, when theſe words are omitted, the general reaſon ſeems the ſame; and when they are uſed, the value is aſcertained without circuity.

Arminer's Caſe.

QUESTION, whether for life or in fee? Deviſe of my worldly eſtate to my daughter *A.* for life; and after her deceaſe, to her daughters *A.* and *B.* equally, according to the cuſtom of the manor: The reſt and reſidue of his goods and chattels undiſpoſed, *viz.* the grange, to his ſon. Contended, that this, by the rules of law, was no more than for life, no more having been expreſſed. It was ſaid farther, the intent of the teſtator was, that it ſhould be no more; for in the inſtance before, where he intended to give an inheritance, he limited after eſtate for life, to them for ever. By a grant for life, he will have diſpoſed of what he calls his worldly eſtate; and this deſcription of it will be naturally and ſufficiently fulfilled, by ſuffering the particular eſtate to deſcend accordingly; and, on its expiration, the reverſion to veſt abſolutely in the heir at law.

The heir at law ſhall not be diſinherited but by expreſs terms: And though in this caſe, he might have diſpleaſure againſt his eldeſt ſon, yet he might be contented to convey the eſtate to the infants in queſtion for life; ſo as to paſs it from his ſon, during his life, in all probability, but not to the diſheriſon of his ſon's children.

Ibbetſon and *Barnewell*, before Lord *Talbot*, and *Tuffnel* and *Page*, before Lord *Hardwicke*, were cited to prove, that paſſing worldly eſtate, did not always infer an intention to paſs the whole intereſt.

Queſtion made, what was to be underſtood by "according to the "cuſtom of the manor?"

It was anſwered, it might be underſtood by cuſtomary fine, *&c.*

It was argued on the other ſide, that another deviſe was to a ſon, in the ſame words, which yet clearly paſſed a fee.

That two precedent deviſes were the ſame, where a fee was admitted, only with theſe words, *for ever*, which did not properly paſs a fee; but in a will, upon the ground of intention. The teſtator gave what was not ſpecifically bequeathed to theſe two: there was no ſpecific bequeſt beſides.

Burr. 2. by Lord *Mansfield.* *Oakes, on the demiſe of Windfall,* againſt *Bridal.*

An enquiry was made, who thoſe were, to whom teſtator paſſed remainder over; but not anſwered.

It was inſiſted by Mr. *Buller*, that the bequeſt firſt made to the ſon, of the grange, excluded him from any thing elſe. And it being admitted, that the general import of the words *my worldly eſtate*, was a diſpoſal of the whole, what was there to counteract the general ſenſe here?

The Caſe of *Oakes* and *Bridall* ſeemed determined on different grounds; and Lord *Mansfield* declared it ſo. For there, it being a deviſe among ſeven, of a houſe and ſtables, (a very ſmall and periſhing property) it was determined it ſhould be ſold, and the money divided.

Lord *Mansfield*—This is the conſtruction of the will of a mariner, [this appeared in the beginning of the will, I think] who ſeems not to have had much abler aſſiſtance. We muſt endeavour to make out his meaning as well as we are able. Nothing is clearer than that, generally, a fee ſhall not paſs without expreſs words of limitation. But in a will, it has been much held, that "*my eſtate*" was implicative of a fee, when it might be made out, from the reſt of the will, to ſignify the intereſt. As when a man ſays, "I "deviſe my eſtate to pay debts." The heir at law is not capable of being diſinherited while any part of the eſtate remains unpaſt elſewhere. This man took plainly his grange and houſe to be chattels; for he ſays, he diſpoſes ſo and ſo of his goods and chattels, not ſpecifically diſpoſed: Namely, "I give the grange to my ſon." A gift of chattels would have been abſolute.

He gives a particular eſtate for life, and remainder for ever, to his grandſon, the ſon of the heir at law; then this eſtate for life to *A.* and then equally to *A.* and *B.* her daughters, according to the cuſtom.

What can this mean? not the ſaving of another man's right; he could not have given the eſtate, ſo as the lord ſhould have loſt his admittances, *&c.* ſuch meaning would have been ſuperfluous and ridiculous. But it has a meaning, as ſignifying the intent of teſtator to paſs a fee; as he knew, *by the cuſtom of the manor, lands were inheritable.* I conſider it as a fee to the grandſon. I reſt not a little on the teſtator's eventually intending to paſs his whole eſtate, afterwards expreſſed by that ſweeping-clauſe, of all his goods and chattels not ſpecifically diſpoſed; and accordingly diſcharge the rule.

On

On the Will of Thomas Rowſe.

THOMAS *Rowſe*, the teſtator, was poſſeſſed of a chattel intereſt, and ſtiles himſelf yeoman in the will.

He deviſes to his wife 10 *l.* out of one of his farms, ſettled on her before marriage; ſtraw to thatch an houſe; and an hogſhead of cyder. He makes *Anne*, his daughter, an infant of three years old, his whole executrix.

And whereas his wife is with child by him, if ſhe have a child after his death, to ſuch child, if male, two third parts of his eſtate; if a daugher, one half. Then *J. Rowſe* and another made executors in truſt.

And in caſe his daughter *A.* and the after-born child *happen to die*, then remainder over.

The event of a poſthumous child did not happen; and it was queſtioned, whether the remainder over could take effect, the contingency precedent having never happened.

And, 2dly, If it could take effect, when? and what was the meaning, "if my daughter die?" What event was it to mark, on which the remainder might veſt?

It was not ſo much argued on the point, where the remainder could veſt, (the poſthumous child, who was to take firſt, not having been born,) as on the ſecond point, what limitation was created by thoſe words, "if my daughter die."

It was contended, that it meant *before my death*; and, if ſo, that the remainder could not veſt, as the daughter ſurvived the teſtator.

It was attempted too, I think, to be argued, that "if my daughter, &c." was inſenſible; becauſe ſhe muſt die, and therefore the remainder could not veſt at all.

On the other hand, it was argued, that here was ſome contingency certainly meant to be ſupplied: It could not be taken to expreſs a general contingency of dying ſome time or other, which the teſtator knew muſt happen; but muſt mean ſome particular contingency.

In caſe my daughter die, and in caſe the other above-mentioned children ſhall die, this is expreſſed as a contingency, though, if taken literally, it's certain. The ſupplying a contingency is where the contingency is neceſſary. By legal neceſſity, I underſtand ſuch a violent preſumption as will admit no contrary preſumption. *Corrington* and *Hellier*, before Lord *Hardwicke*. In the caſe of *Chapman* and *Brown*, before your Lordſhip, this court would not ſupply a contingency, to deſtroy remainders. I preſume, the reaſon is, that every part of the will muſt be performed according to the intention. I conceive, this governing rule here applied, will the moſt ſecure poſſeſſion. I here underſtand the teſtator to have had great diſlike and diſtruſt of his wife. He intruſts the care of the education of his children to his ſiſter-in-law, *Anne Rowſe*. He conſidered it might happen, that the wife, if his children ſhould come of age to diſpoſe, might induce them, from their filial love, to give their whole ſhare to the mother; if not, ſhe would come in for her diſtributive ſhare. "If "my daughter *A.* die, and the other after-born children die."

"If my daughter *Anne* die"—When? Before my death, tis ſaid. "And the other after-born children die"—When? Not before my death, for that implies a contradiction; and are we to ſupply two different contingencies? one to ſuit one part, and the other another part. Certainly, if ſhe die before ſhe come of age, or if ſhe die unmarried. Otherwiſe, what we contend for, that the wife ſhould not come in, would be overſet. *Chapman* and *Brown*. We can't on arbitrary conjectures, however probable, ſupply omiſſions.

Serjeant *Glynn*—The courts of law have never introduced confuſion of the executive and legiſlative power. The intention of the will, conſidered on the whole, will certainly govern. In this caſe, *A.* has a wife, a daughter, and a ſiſter. He conſiders the daughter as the ſole preſent object, and accordingly gives her all; but, recollecting there may be ſome poſthumous children, he makes the uſual proviſion of two third parts, if a ſon; if a daughter, to ſhare equally. Then are the words, "If my daughter *A.* die, and the af- "ter-born child die." Theſe words are underſtood, on all hands, to be obſcure. Mr. *Heath* has contended, the court will not ſupply two contrary conſtructions—I ſuppoſe this rather a technical diſtinction, than ſuch an one as courts are uſually governed by in the conſtruction of a will, We do not want here, however, to ſupply a double conſtruction. If my daughter die before ſhe is of age to diſpoſe: I ſubmit, the apparent intention requires the conſtruction ſhould be, if they die before they are of age to diſpoſe. This is a queſtion of a perſonal eſtate; it's a family proviſion: 'Tis not like the diſpoſal of a real eſtate in ſeveral branches; more for perpetuating a name, very often, than for other conſiderations. It's the great part of the benefit of ſuch a gift, in our caſe, that when the parties come of age to diſpoſe they may have the abſolute power. If a poſthumous ſon ſhould have been born; if it had been underſtood, "if ſuch poſthumous ſon die unmarried," the perſonalty might be to remain forty or fifty years uſeleſs: That would be abſurd in any caſe; incredible in this caſe of ours. I contend here, no eſtate is defeated by this conſtruction: That a reverſion is given to the brother and ſon of the teſtator, is begging the queſtion; and therefore, I urge, the leſſee of the plaintiff has no claim.

Lord *Mansfield*—*Thomas Rowſe*, the teſtator, was poſſeſſed of a chattel, and was a yeoman.

Deviſe to his beloved wife, of 10*l.* out of one of the farms, which he had ſettled before her marriage; ſtraw to thatch a houſe, as much as ſhe ſhould chooſe to thatch *him*; and an hogſhead of cyder. *Anne*, whole executrix, who was three years of age; and, ſuppoſing his wife enſient, if ſhe have a child after his death, to ſuch child, if male, two third parts; if a daughter, one half. Then *J. Rowſe* and another made executors, in truſt; and in caſe the daughter and the after-born child happen to die, then remainder over. The idea, that courts are to find out the intention from the general view of the will, is right; and, conſidering the great abuſe of language every where, the ignorance of particular teſtators, and even of thoſe who make wills for them, that meaning cannot be found out by the accuracy of expreſſion. If the letter is taken, the leſſee of the plaintiff can't take; for the contingency has never happened; the poſthumous child has not been born. One of the oldeſt caſes that has happened in the world is, where a teſtator has taken for granted a contingency which never happened, and thereon founded a limitation over, what ſhall be the fate of this limitation? This was the caſe of *Jones* and *Weſtcombe*, in Chancery. I believe, in the printed caſe, a long ſtring of caſes will be found, cited by me. Upon another caſe, the court of Common Pleas was of one opinion, this court and the court of Chancery of another. The caſe of *Craſſus* and *Scævola*, in the time of ancient *Rome*, was preciſely this: It had long been contended, that where the contingency did not take place that was primarily in the view of the teſtator, deviſe over was gone. It now ſeems eſtabliſhed, that if what was the original object of the teſtator hath not happened, that yet, what he intended further, ſhould take effect. On the will of *Preſgrave*: This was a deviſe to a child, of whom teſtator's wife was enſient, which ſhould be born after his death. The wife had ſeveral children, all in the teſtator's life. It was there held, that the child, who was to have taken if poſthumous, ſhould take: As there was no reaſon to think, if he meant the child to take if born after his death, on the preſumption that it would be ſo born, that he did not mean the ſame child to take if born during his life. To conſider the will particularly: *Anne* was made whole executrix; ſhe was but three years old: He can't mean ſhe ſhould act as executrix; he underſtood that, by making her executrix, he gave her the reſidue. He appoints executors in truſt; he appoints his ſiſter to take care of this daughter: No other ſon or daughter was born.

The daughter lives fifteen years after coming of age. The teſtator does not appear to have had any great affection to his wife: He gives little but what he muſt. The dying muſt be underſtood a contingent dying; "in caſe ſhe die," cannot be underſtood otherwiſe. The contingency, I take to be, the dying before a capacity to act as executrix: In which contingency, he had rather the deviſee over had taken than the adminiſtrator.

Cheſterton *againſt* Cheſterton.

For Certificate out of Chancery.

"I Give and bequeath all my freehold and copyhold eſtate." Whether this be a deviſe in fee, or for life; there being no farther limitation?

Lord *Mansfield*—The general rule, to be ſure, is, that without words of limitation, an eſtate for life only paſſes. But, I believe, whenever it takes effect, though it muſt ſtand as a determination, I am afraid the teſtator's intent is diſappointed. But in a caſe where the word *eſtate* is uſed, it ſhall be taken, the full right and inheritance; unleſs where it's plainly ſo reſtrained, that it muſt be ſynonimous to *land*, "As all my eſtate or land lying and being;" *expreſſing locality*. But here is, technically and accurately, "*freehold* "and *copyhold*;" theſe are eſtates of *inheritance*, and paſs as ſuch by that deſcription; and in 1746, in a caſe from Chancery, *Snee* *and Cornwitt* againſt *Dell and Cornwitt*, this court was of opinion, when the teſtator had ſeveral eſtates, freehold and copyhold, equity of redemption, *&c.* ſeven or eight different kinds, and ſaid, "I "give *my eſtate* to my wife"—this was ſaid to mean for life only; for the mortgage could not be given her in fee. On this, the court held clearly, that of ſuch eſtates, of which an inheritance could lawfully paſs, *viz.* the freehold and copyhold, the inheritance paſſed to the wife.* We ſhall make our certificate, therefore, accordingly in the caſe, if we don't alter our opinion; which we don't imagine. We will let you know.

In this caſe farther, from a view of the will, it appears that the teſtator has given a plain inheritance to his eldeſt ſon in another part, in the ſame terms, "eſtate."

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* Verba generaliter dicta reſtringuntur ad habilitatem rei vel perſonæ.

Hilary

Hilary Term,

13 Geo. 3. 1773. K. B.

Doe, on Demiſe of Burville, *againſt* Burville.

THIS caſe was argued in the King's Bench, *Michaelmas* term, *November* 1772. Special verdict.

A. deviſes in truſt to *B.* for the uſe of his wife; and after her deceaſe, to the uſe of his ſon *D.* for life, without impeachment of waſte, remainder to the heirs male of his body; and in default of ſuch iſſue, to the heirs female; remainder, in like manner, to his other ſons; remainder over to the uſe of his daughters, as tenants in common, (if two or more,) and not as joint-tenants.

Remainder to the heirs of his brother *Abraham* for ever. All the ſons die without iſſue. The daughters die, being ſeven in number, in the life of the ſurvivor of the two ſons. Queſtion, whether croſs remainders to the daughters can take place?

It was pleaded in this manner, in favour of croſs remainders.

Mr. *Le Maitre*—This being the conſtruction of a will, not of a deed, and being not to the diſinheriſon of an heir, for this reaſon, croſs remainders, by implication, though by the general rule of law not admitted except in expreſs words, will be thought within the reaſon of the law; notwithſtanding the *dictum*, that croſs remainders ſhall not take place where more than two.

4 *Leon.* 14. called by Lord *Hardwicke* the leading caſe. *Cro. Ja.* cited. *Dyer* 330. The teſtator had a ſon *H.* and two daughters, and meſſuages in fee; one of 24 ſhillings value; the other of 36 ſhillings. *H.* had iſſue two ſons, who died, living the father. He deviſes one meſſuage to his daughter *Alice* and her heirs for ever, and the other to *Thomaſin* and her heirs for ever; and upon the death of either reſpectively without iſſue, he gives over her part to

the other, and her heirs for ever; and if both die without iſſ then to his two grandſons.

Three of the judges thought it croſs remainders to the daughte

Dyer 300. A man had five ſons, his wife enſient of the ſixth, a he deviſed the third part of all his lands to his ſon and heir; t other two parts to his four younger ſons, by name, and the heirs ma of their body begotten; and if the *enſan en ventre* was a ſon, th he to have his fifth part with his four younger brothers, as coheir and if all five died without iſſue, reverſion to her right heirs for ev The ſixth ſon died, and three of the younger. Adjudged, the ſurvivor ſhould have the two entire parts.

Holmes and *Meynell*, 4 *Raym.* 425. *A.* deviſes lands to his tw daughters, equally to be divided between them; and if they die without iſſue, to his nephew. The eldeſt daughter died without iſſue; th other daughter entered. Queſtion, whether her entry lawful; an whether the deviſe took place to the nephew, on the death of one o the daughters only? The court conſidered it as a croſs remainder.

Cole and *Levinſon*, (*Ventris.*) Implication of croſs remainder take not good, on account of expreſs words to the contrary. *Cumber* an *Hill*, *Hilary* term, 7 *Geo.* 2. On a ſpecial verdict on ejectmen Lord *Hardwicke* obſerved the authority of the caſe of *Holmes* an *Meynell*. Difference taken there, as the deviſees were of equal relation.

Brown and *Williams*, Lord Chief Juſtice *Lee* cited, to prov contingent remainders might be by implication. But it was ſaid from Lord *Mansfield*, that Lord *Hardwicke* gave his opinion to the contrary. And Lord *Mansfield* cited another caſe, where it was held that a croſs remainder was bad; becauſe, though on the event there were but two, there might have been more; and ſo not good in creation.*

Before Lord *Northington*, *Wright* and *Holford*. On Mrs. *Holford*'s will, 1767, ſeveral limitations to ſons, a limitation to daughters, not thought good; becauſe there might have been more than two. Lord *Northington* did not take that opinion to be law; determined otherwiſe: And on appeal to the Houſe of Lords, judgment according to that opinion.

Before Lord *Camden* a caſe was argued, in which his Lordſhip ſaid, that croſs remainders could not be by deed, but by will. That it had been ſaid, that croſs remainders could not be between more than two; but never determined: That if it ever came before the

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* Quod ab initio non valuit, tractu temporis non convaleſcet.

court,

t, it would deſerve conſideration. That therefore, croſs remain- , in the caſe of children againſt more remote relations, ſhould thought admiſſible, on the great authorities by which Judge *ldridge*'s *dictum* is overſet, of remainders between more than . Theſe conſiderations will, I hope, entitle me to the judgment the court; and, in conſequence, a verdict for a moiety.

erjeant *Hill*—I underſtand the argument had to be diviſible into o heads:

The firſt is, that there is no force in the doctrine of croſs remain- s by implication, between more than two. If it has been re- ved as eſtabliſhed by judges, counſel, and conveyancers, I profeſs, *re deciſis* is, in my idea, the beſt rule; and I truſt that the court ll not overſet a reſolution ſo taking riſe, ſo nouriſhed and matu- d. I aſſure myſelf, I ſhall prove it not to be the *dictum* of *Dodd- dge* only.

2 *Roll's* 471. A cotemporary judgment to *Gilbert* and *Witten*, ys, it was not the opinion of *Doddridge* only, but of three of the dges who ſat, againſt the Lord Chief Juſtice. Lord Chief Juſtice *mberton* underſtood thus in the caſe of *Holmes*, 2 *Jones*. The ſe of *Gilbert* and *Witten* agrees with the caſe here, only with the fference of being between two; for it cannot be between three or ore. I underſtand Sir *T. Raymond*'s argument, which he has re- orted, in the ſame manner. Let me take notice of the firſt caſe, *yer* 303. The caſe there was not looked upon to be law: The ords are "*il ſemble*," which implies a reporter's opinion only. It as cited in ſubſequent caſes, alluded to, but not admitted to be w. *Hales* ſaid, Nor would it be if it was in a will; for croſs re- ainders cannot be between three or more, without expreſs words.

The next in which the doctrine was received, that croſs remain- ers cannot be between more than two, is *Williams* and *Brown*. There it was ſaid, the court relied on the caſe of *Coomber* and *Hill*; nd ſaid afterwards, that croſs remainders cannot be to more than wo: This is not the only caſe. *Marriet* and *Townley*, 1 *Vez*. ord *Hardwicke* ſays, with expreſs words, "there might be croſs "remainders to more than two, with expreſs words:" Doubtleſs, they might; but we ſay, not without: And this appears to have been the opinion of ſome of the ableſt judges that ever ſat on the bench. I nderſtand the caſe to have been very different before Lord *Camden*; it being on articles for conveying ſtock, and articles being executory.

The caſe of *Wright* and *Lord Cadogan*, cited on the other ſide as *Wright* and *Holford*. If I may be expected to ſpeak ſomething of reaſons, (which, in a queſtion drawn from obſcure antiquity, perhaps is not neceſſary) Lord *Hardwicke* conſidered it to be the avoiding ſplitting of tenures. Other reaſons have been attempted but I contend for it as a fixed maxim of law, which it is now to late to ſhake. The predilection of a teſtator to his own childre preferably to remote relations, has been argued. I don't deny it t have weight; but I ſay, no queſtion was ever determined on i ſingly.

I come to the ſecond queſtion, Whether, whatever may have bee the general rule, any implication may be raiſed here, from the words of the will?

Coomber and *Hill*, Lord *Hardwicke*. "The rule is, and I know "not a better or clearer, to make croſs remainders there muſt be either expreſs words, or neceſſary implication. The words, when to "take place by neceſſary implication, muſt be ſuch as cannot be ſatisfied by any more than one conſtruction." I apprehend too, that croſs remainders are in the nature of a jointenancy; ſo that, here croſs remainders would be contrary to the words of the will, which expreſsly exclude jointenancy: And when the teſtator has deviſed a tenancy in tail, in common, I cannot ſee how we are to imply croſs remainders.

The gentlemen muſt be driven to ſay, that the court is warranted, in the conſtruction of a legal deviſe, to inſert words between the ſubſtantive deviſe and the laſt contingent remainder, to create croſs remainders. I conceive, it ſtands totally indifferent, whether the teſtator meant to raiſe croſs remainders or no.

In the caſe of *Leach* and *Jackſon*, 1771, Lord *Apſley* ſaid, the doctrine in the caſe of *Wright* and *Lord Cadogan* did not, he underſtood, overſet the doctrine we contend for.

In reply, Mr. *Le Maitre*—The caſe of 4 *Mod.* has never been anſwered. As to the ſtreſs laid on jointenancy, the teſtator is *inops conſilii*; and other meanings might be underſtood of that word; as that they ſhould not take jointly, to the diſheriſon of thoſe in remainder. Intermediate words do not appear neceſſary to be inſerted here, when the remainder is to a remote relation. With regard to *ſtare deciſis*; I always thought, that there ſhould be a reaſon which either continues to exiſt, or exiſted at the time, or at leaſt no reaſon to the contrary; *et malus uſus abolendus*.

Lord *Mansfield*—It will be proper to argue again. It has been very well argued; but I would wiſh the order inverted the next time: Firſt, "By conſidering what the intention is;" and then, "Whether it will be good, or otherwiſe, by any rule of law." It's obſervable, that the eſtate is diviſible into three parts: He deviſes to his ſons for life, ſucceſſively; with remainders to the heirs male of each reſpectively; remainder to their heirs female reſpectively: So that the heirs female muſt take before it deſcends from one ſon to the other. He limits to his daughters, not calling them heirs female, but daughters; then in a familiar manner, to be drawn technically afterwards, with remainders.

As to neceſſary implication, That is now admitted to underſtand highly probable implication. As to confuſion, If the daughters died without iſſue, and there were ſix more, it would create as much confuſion by deſcent as by croſs remainder. If in the caſe before the Houſe of Lords, the queſtion was expreſsly on that point, it will have great weight; but if it was *in tranſitu*, it will have much leſs. What Lord *Hardwicke* ſaid of neceſſary implication, muſt be underſtood in the general view; or otherwiſe it muſt be by expreſs words, and not implication. Let the whole will be added to the caſe.

The entire caſe appears to be this, which I had from a draught ſhewn me by a friend, and which appears very accurate.

The teſtator was poſſeſſed of three eſtates: His capital meſſuage, and lands thereunto belonging; an eſtate at *Headcorne*; another at *Boxley*; all in the county of *Kent*. By his will he deviſes his capital meſſuage, and the lands thereunto belonging, to his wife for life.

Remainder to his eldeſt ſon *James*, in tail male; remainder in tail female.

Remainder to his ſecond ſon *John*, in tail male; remainder in tail female.

Remainder to his third ſon *George*, in tail male, with like remainder.

Then follow theſe words, "And for want of ſuch iſſue, to all "and every my daughter and daughters, as tenants in common, if "more than two, and not as joint tenants, and to the heirs of their "bodies iſſuing."

"Remainder to the heirs of my brother *Abraham* for ever."

The ſame diſpoſition of the eſtate at *Headcorne*; only the ſecond ſon is preferred, and the eldeſt named laſt.

The ſame as to the eſtate at *Boxley*; only the third is preferred.

The like remainders to the daughters, in the ſame words.

The like remainder to the heirs of *Abraham*, in fee.

The teſtator had three ſons and ſeven daughters. All the daughters are dead in the life of the ſurviving ſon *John*, who is dead, as all his brothers, without iſſue.

1000*l.* portions given to his daughters, to be paid on the day of marriage with conſent of his wife. 30*l. per annum* if, after coming of age, they ſhould chooſe to live ſeparate.

Deviſe of 10*l. per annum* to his brother *Abraham*.

This was tried in the aſſizes for the county of *Kent*. Queſtion, If croſs remainders to the daughters?

5th *February* 1773. Mr. *Cox*—This gentleman, though perhaps not poſſeſſed of a very large fortune, ſeems deſirous of making a very ſtrict ſettlement.

The whole will is now ſtated, purſuant to the directions of the court.

If there was a doubt what was the intent, I hope it is now clear. He appears to have had an inclination very ſtrong, to keep the eſtates ſeparate. If croſs remainders can take place, then part of the eſtate may be in the daughters of *James*, and part of the ſame eſtate in the heirs of *John*.

Theſe words I look on as very remarkable: "And in default of "ſuch iſſue, to all and every my daughter and daughters, if two or "more, *&c.* as above."

V. ſupra, Pitt *and* Harbin.

"If two or more," is expreſsly, as if he had ſaid, more than one. If the ſix daughters die, is it poſſible that the ſurviving daughter ſhould not take the whole, before the heirs of his brother *Abraham?* Then, if on the death of any daughter, the part of that daughter was to go to the heir of his brother *Abraham*, yet on the ſurvivorſhip of one daughter after all the reſt, the whole would be to be retained, how is this to be conceived? He ſays too, "*her* and "their bodies," uſing the ſingular number. Then remainder to the heirs of his brother *Abraham*, who could be no particular perſon he could have in contemplation, the remainder being to take place after the death of his ten children. I muſt obſerve, with reſpect to the caſe of *Gilbert* and *Witten*, that it, and the caſes which have been governed by it, which have been very few, ſtand principally upon

on the ſingle *dictum* (very reſpectable, indeed) of Juſtice *Dodd-*
dge.

The intent of the teſtator has always been very ſtrongly conſi- red: The limitation over has been in favour of a perſon in being. he underſtanding of words in deviſes has great difficulty. The urt, in *Gilbert* and *Witten*, ſays, "The teſtator having given ſeveral meſſuages *diſtinctly*, to ſeveral perſons, there is no croſs remainder; the teſtator's expreſs intent being to keep the eſtates ſeparate." Mr. Juſtice *Doddridge* ſaid, "*Croſs remainders cannot be by implication between more than two.* The eſtates having been given ſeverally here, croſs remainders would be againſt the intent." Great opinions have been againſt that of Juſtice *Doddridge*, *olmes* and *Meyneil:* The contrary opinion was declared more con- nant to the intent of the teſtator, which ought to govern. As to e opinion of the court in that caſe, founded on the expreſſions, e may well admit it. Lord *Northington* took notice of the *dictum* f *Doddridge*, which, he ſays, he did not know had ever been ſo- mnly determined.

2 *Roll's Rep.* 224. Here the original limitation was in favour of wo ſtrangers; remainder to the heir at law.

Dyer 330. In this caſe the declared project of the teſtator was to eep the eſtates ſeparate to the iſſue of his eldeſt ſon.

"To the heirs of their bodies reſpectively." Here the plain ntention was, to keep ſeparate; and the remainder-man was in qual degree. Lord *Hardwicke* laid great ſtreſs on the word "*reſpectively*:" That it was the ſame as if a moiety had been given: *hat it cannot be underſtood by implication, that the teſtator meant to ive over his eſtate, while heirs of his own body were ſtill living.* *rown* and *Williams*, 2 *Strange*; here, too, was the word "*reſpectively*."

Cole and *Levinſon*. This was on covenant to ſtand ſeized to ſes. The court ſaid, it would have been otherwiſe in a will.

Dyer 303. I believe, Lord *Hardwicke* calls the leading caſe: A man had five ſons; his wife enſient of a ſon.

4 *Leon* 14. There the limitation was in favour of ſons; the remainder over was to a ſtranger. An heir who might be an hundred years hence, ſeems equal to a ſtranger. Caſe of *Holmes* and *Meynell*, *Skinner*.

The court ſaid, "*That to give againſt the child of the teſtator,* "*would be againſt nature.*" That even the words would not be ſufficient, any more than the intent; the words being, "If they "die," which cannot be ſatisfied by the death of one. He ſaid, he approved the diſtinction of *Doddridge*. What he might probably conſider as the diſtinction here, I can't pronounce; but, as he declares the eſtates given ſeparate, were to be kept ſeveral, it takes it out of our caſe.

Wright and *Cadogan*. Lord *Northington* had ſo prepoſſeſſed himſelf in favour of croſs remainders, that he would hardly ſuffer Mr. *Yorke* to argue it.

Twiſden and *Locke*, before Lord *Camden*. Queſtion, Whether croſs remainders?

Lord *Camden* ſaid—"*I am clear croſs remainders cannot be in a* "*deed by implication—Courts uſed to lean againſt them. Doddridge,* "*arguendo*, ſaid, That croſs remainders cannot be raiſed by implica-"tion: *If it comes to be argued, it will deſerve conſideration.*" The word *reſpectively* had great ſtreſs laid upon it. In the other caſe, croſs remainders would have been allowed, if it had not been for the word *reſpectively*.

As to inconvenience, Suppoſe *Abraham* had had ſeven daughters: Take the other part; will not the confuſion in that caſe, on their ſide, be equal?

It has been argued in favour of relation——Here is a regular gradation: Firſt, the ſons; then, the daughters; then, on all their dying, *&c.* the remainder to the heirs of his brother *Abraham*.

The words *with remainder*, I hold to be of great force. A remainder I underſtand to be, what I have not diſpoſed already. It appeared on enquiry, that the teſtator died about four months from making the will.

Lord *Mansfield*—Are you at all agreed as to the age of this man and his wife?

Anſwer—Whatever his age was, it appears by the limitation to his daughter, he had not in contemplation any daughters hereafter to be born.

Mr. Juſtice *Aſhhurſt*—After limitation to his ſon, limitation goes immediately to his daughters: So that he had no contemplation of having more ſons.

Mr. *Wallace*—We are to conſider, Whether the intent of croſs remainders to be created, was in the teſtator. Next, Whether the rules

les of law will maintain it. To the ſons it was clearly an eſtate il; their daughters were not to take by purchaſe; there could be o croſs remainders between them. The daughters of his ſons are eferred to his own daughters. We are not in the caſe of perſons ntirely unprovided for.

If a meaning in favour of ſuch remainder can be made out by the ords, the rule of law muſt take effect. I don't ſee any difference the words, "for default of iſſue," to ground a ſtrong diſtinction pon.

The undivided eſtate is relied on much: But making them te-ants in common is equivalent to cutting it into ſeven portions.

In the caſe of *Dyer* 303. the words governed.

In the caſe of *Leonard*, the words *whole eſtate*. For it cannot be aken, that on the death of one the other ſhould be ouſted by the emainder-man.

The caſe of *Holmes* and *Meynell*.

Caſe of *Wright* and *Cadogan*. If Lord *Northington* determined without argument, according to Mr. *Cox*, I preſume it's left open for argument. Here the matter in queſtion was, as to validity of articles of appointment: This part of the caſe did not come into conſideration. The parties, I know, ſtill underſtand that matter to be open to argument. I therefore apprehend, the decree of the Houſe did not decide this point.

The caſe determined by Lord *Camden* was on articles of marriage; refers to the caſe before Lord *Northington*, which I have relied on to be open to argument.

As to the rule of law—

The caſe in *Dyer*, commonly called *Huntley*'s caſe.

This was decided on deviſe of *an entire tenement* to two different perſons: On the death of one, moiety to remainder. This is ſubſequent in time to the other, quoted by Mr. *Cox* from the ſame book.

Gilbert and *Witten*. On the death of one, the whole to remainder-man. I allow here there are three tenements.

Coomber and *Hill*. My Lord *Hardwicke* did not determine on the word *reſpectively*, but as of additional force.

Lord *Hardwicke*—Croſs remainders have never been created by the words "for default of iſſue." Mr. *Cox* would carry the words to take that effect.

Brown and *Williams*. My Lord Chancellor was of opinion, the caſe was not ſtrong enough to admit croſs remainders, which are never favoured by law, and can only be created by neceſſary implication. Then the words *ſeverally* and *reſpectively* were taken notice of, as effectually disjoining.

Let us ſee what can be done in raiſing croſs remainders between more than two.

Mr. Juſtice *Doddridge* ſays, Although, peradventure, a croſs remainder may be between two, yet if there be more than two, croſs remainders cannot be without expreſs limitation; becauſe of the great inconvenience and uncertainty.

Juſtice *Bridgeman*, *Carter* 171.

Meynell and *Holmes*, allowed by Juſtice *Pemberton*.

Cole and *Levinſon*, Juſtice *Hale* allows it.

Lord *Raymond* had prepared an argument on that ground, which he gives in his Reports; but had not occaſion to argue it.

Brown and *Williams*. Lord *Hardwicke* ſays, On account of the great confuſion and uncertainty, croſs remainders ſhall not be between more than two.

Juſtice *Lee* ſays, The rule of *Doddridge* has been underſtood as law.

As low as 1748, Lord *Hardwicke* continued in the ſame opinion. 2 *Vezey* 105. The law avoided croſs remainders between more than two on original grounds, to avoid ſplitting of tenures. I have mentioned another reaſon, becauſe of the uncertainty of the eſtate to be taken by the ſurvivor. By expreſs words, he ſays, they may.

Lord *Camden* did not judge it determined: He ſaid only, If it was brought in queſtion, it would require to be ſolemnly argued.

As to this diſtinction imputed to Juſtice *Doddridge*, of remainders between two, and between more, it ſeems to have been conſidered as law before his time, and has been recognized ever ſince.

Lord *Mansfield*—If it had been determined in this appeal in the Houſe of Lords, in the caſe of *Wright*, all the judges would have een called on. A determination would have had great weight. was in the Houſe, and left it before the decree was made, s nothing difficult was entered into. The decree went on the ther ground.

Mr. *Cox*—What I argued was with a view, not of conſidering whether one eſtate-tail might be conſolidated out of two; but hat no ſon of *John* could take while *James* was living: It was argued, that "with remainder," has no more effect than "on default of iſſue;" it ſeems to me, that "with remainder" has the effect of confining the ſenſe of the words "on default of iſſue" to the death of all the daughters.

In the Caſe of *Dyer*, the word *all* did not determine.

In the caſe of *Leon.* the words did not determine.

As to recognizing the words of Juſtice *Doddridge*, I take the ground of his *dictum* not to be in our law.

Tenancy in common, it was ſaid, muſt operate to ſeparate the eſtates. I will then aſk, what is to become of the words "to all "and every my daughter and daughters;" and then again, "to the "uſe of *her* and their bodies?"

Lord *Mansfield*—This is a caſe, which has been greatly agitated for above a century; and it will require being ſpoken to with preciſion. Let it therefore ſtand over. 'Tis a rule of property; and it is of much greater conſequence that it ſhould be determined, than on which ſide. The teſtator had no idea of *Abraham*'s taking; he carries over to the heirs of *Abraham*; which gives an appearance as if *Abraham* was to take after his lineal deſcendants ſhould fail. This is as in the caſe of ſettlements; it is a family proviſion: 'Tis made in form of ſtrict ſettlement. Where implication has been received, it has not been by technical words, as in a deed, but by evident expreſſion of intent.

It came to judgment in *Eaſter* term, 22d *May* 1773.

Lord *Mansfield*—One *George Charlton*, having a wife and three ſons, *James*, *John*, and *George*, and ſeven daughters, made his will in 1770. He gives portions; makes regulations concerning time of payment, conſent and the like. He gives a legacy of 10*l.* to his brother *A.* which is no otherwiſe material than as ſhewing him alive. He gives ſome lands in fee to his eldeſt ſon; then, of other

eſtates,

eſtates, firſt a deviſe to his wiſe for life, to *James* for life, remain der in tail-general, like remainder to his other ſons; then limita tion, to the uſe of all and every my daughter and daughters, if tw or more, as tenants in common, and not as joint-tenants, and th heirs of her and their bodies iſſuing, remainder to the heirs of m brother *Abraham*. Then, of the ſecond eſtate, after limitation, to ſo as before; and for default of ſuch iſſue to all and every my daughte and daughters, as tenants in common, and not as joint-tenants [*the reſt as above.*] Then the third eſtate in like manner, as tenant in common, and not as joint-tenants, *&c.* with remainder to th heirs of my brother *Abraham* for ever. The teſtator died, leaving iſſue his three ſons and ſeven daughters. The daughters all died without iſſue in the life of the ſurviving ſon; the ſon is alſo dea without iſſue: Queſtion, without ſtating how it ariſes, Whether croſs remainders can be between the daughters? If croſs remainders a verdict for a moiety; if not, a nonſuit. 'Tis certain, that ſurvi-vorſhip by expreſs terms may be limited. *Now, if the intent may b clearly ſeen, ſtrictneſs of words is not required by law upon a will.* Th argument did not ſo much reſt on the intent, as on a rule of con-ſtruction echoed backwards and forwards. 'Tis certain, as to th reaſon aſſigned why croſs remainders ſhould not be between more than two to avoid ſplitting of tenures, this might come in by way of argument; for certainly, by law, there might be ſuch remainders. But as this rule has been frequently uſed in argument, and even judgment, though never judicially decided on alone, we think i ought to have great weight, as far as the meaning goes; which we take to be, "that between two, preſumption is in favour of croſ "remainders; between more than two, preſumption is againſ "them: But either may be counteracted on evidence of intent."

In the caſe of *Coomber* v. *Hill*, croſs remainders were diſallowed.

In the caſe of *Browne* v. *Williams*, for the ſame reaſon.

Gilbert v. *Witten*, between three croſs remainders, diſallowed.

Cole v. *Levinſon*. Juſtice *Hale* ſaid, That if croſs remainders were between three, it would not be allowed, unleſs intent.

In *Mariot* v. *Townley*, Lord *Hardwicke* ſaid, That croſs remain-ders could not be between more than two, *unleſs it appeared by the words plainly to be the intent*. The words in that caſe were "as "joint-tenants."

In *Gilbert* v. *Witten*, [Juſtice *Pemberton*] The court will not effectuate croſs remainders between more than two, *unleſs the intent be plain and unavoidable, ſo as to force the court to give them.* We will ſee what intent appears here; now he evidently regards the or-der er of ſucceſſion; the female line is to take after the male in every ne of the eſtates limited, ſucceſſively, to his three ſons. Then is daughters have their limitation. He evidently preſumed his daughrs might be reduced to two, or one only, before the time of ſuch mitation taking effect to them. If *two or more* are the words, and ey are to take nothing leſs than the whole, *remainder* (*in the ſingur number*) to the *heirs* of his brother *Abraham*, not expecting his rother ſhould live to take; if he had expreſsly given to his daughters, take by ſurvivorſhip, this would have made what the law calls a roſs remainder; and he has done it as effectually as if in technical rms. *There would have been no doubt had it been leſs expreſs in ords, for the limitations are ſo ſtrict in deſcent, that it cannot be ſupſed the heirs of* Abraham *were to take while any deſcendants of the ſtator ſurvived, according to the ſucceſſive deſcent he had eſtabliſhed.* there had been one daughter, ſhe was to have taken nothing leſs han the whole; the heirs of *Abraham* were to take nothing leſs han the whole. *The teſtator could not have limited croſs remainders ore clearly and ſignificantly.* My brother *Willes* is of the ſame pinion. Conſequence, that verdict ſtands for the moiety.

St. John *againſt* Errington.

ON a feigned action of covenant, to try the right of an advowſon under a will, as between the deviſee and the heir at aw.

The words *contracted and agreed*, determined by circumſtances f intent to include and paſs with effect eſtate abſolutely purchaſed s well as in contract.

Words "con-
"tracted and
"agreed" de-
termined to
ſignify pur-
chaſe as well
as contract.

The caſe then ſtated appears thus: The teſtator had a very large ſtate in diverſe other counties, but in the county of *Hampſhire* had othing at all. He had a mind to purchaſe there for his wife. He fterwards, in conſequence of this inclination, enters into articles or the purchaſe of an advowſon. Under theſe circumſtances, and *aving one advowſon, actually purchaſed, and the contract upon the ther being executory, he makes his will*, and gives thus: All my *adowſons* in the county of *Hants, for the purchaſe whereof I have lready contracted and agreed*, to his wife. Theſe, I think are the ery words. Queſtion, Whether the purchaſed advowſon, with hat for which he had only contracted, paſſed?

Lord *Mansfield*, in delivering the judgment of the court, was very rief. He obſerved, *That the teſtator conſidered a purchaſe as well paſſing under the expreſſion of contracted and agreed for; every purchaſe was a contract, and ſomething more.* The teſtator rightly conſidered very thing complete, but the mere form of conveyance. He took, therefore, no difference between a contract *executory* under ſuch circumſtances, and *one executed*. We can't ſatisfy the intent; and ſhould violate the words, if we did not take it as a deviſe to the wiſe of *both advowſons*.

After the judgment, Mr. *Wallace* got up, and ſaid—To ſatisfy your Lordſhip fully, how perfectly right you was in conſtruction of the teſtator's intent; I may now produce, what was perhaps no legal authority in this ſtage of the buſineſs, the inſtructions given by the teſtator in his own hand-writing: "All my advowſons in the "county of *Hants* already purchaſed, or for the purchaſe whereof "I have contracted and agreed."

For what paſſed in the Common Pleas, *vide infra*.

Arminer, Aſſignee of Grey, *againſt* Spotwood.

An execution againſt a bankrupt adverſe, and not procured by him, ſhall not make a bankruptcy relate to the day of the ſervice of the writ; though a fraudulent uſe may have been made, a ſecret judgment ſhall not bind the goods. Attachment does not ſeem to mean execution. If the creditor does not proceed to actual execution, but lies by till act of bankruptcy, he ſhall loſe his goods notwithſtanding ſervice of the writ; for they are oſtenſibly the goods of the bankrupt, and as ſuch the creditor ſhall take them.

ON an iſſue directed out of Chancery, to try whether the bankrupt became ſo the 5th of *April* 1769; or on any, and what time——

This caſe came on to be argued in *Michaelmas* term 1772; and was thus, on a ſpecial verdict.

An execution on the 5th of *April* 1769, againſt the defendant, *boná fide*; but kept ſecret from the creditors till 1769: Execution was openly levied, the ſheriff's officer lived all the time in *Grey's* houſe; ſome time after, by agreement, *Grey* paid *Spotwood* a debt of 1400*l*.

It does not appear of what value, or of what kind, the goods. In the interval, nobody ſuſpected the goods to have a ſecret lien on them; and he contracted ſeveral great debts. On the 8th of *May* the jury find an act of bankruptcy: Queſtion, Whether this was an act of bankruptcy on the 5th of *April*, within the 21 *J. c.* 18. which recites to this effect; Whereas frauds daily encreaſe, to the great hurt of the realm, *&c.* and provides, that if a trader departs the realm, procures arreſt, or makes any fraudulent conveyance, that he become a bankrupt; or by procuring his goods to be attached or ſequeſtered? If the defendant has procured his goods to be attached or ſequeſtered, or made a fraudulent conveyance, he then is within the act; conſider him under both theſe appearances.

It was obſerved by Mr. Juſtice *Blackſtone*, That the law is very anxious to catch a trader on the firſt inſtant of his decline, that he may not wantonly proceed to ruin himſelf and his creditors. The caſe of *Slater* v. *De Matthews*, was an aſſignment of all; but the court,

ourt, in their judgment of that caſe reſted here. Suppoſe a bankupt can favour a creditor by an aſſignment of all, yet the ſecret onveyance was fraudulent. *Burr.* 821. Juſtice *Denniſon*—An aſſignent of all is an act of bankruptcy; becauſe it muſt be fraud. uſtice *King*, in the caſe of *Jacobs*, ſays, That an aſſignment of part f fraudulent, is an act of bankruptcy.

It may be obſerved, that the conſtruction of penal ſtatutes muſt ot be extreme: Firſt, This is not on a penal ſtatute, for ſtatutes of ankruptcy are not conſidered penal. But I know only one rule, hat all ſtatutes muſt be conſidered, as ruled in *Heydon*'s caſe, to adance the remedy and public good; this was the opinion of all the udges in the Exchequer. The ſtatute of 21 *James* declares, all laws oncerning bankruptcies ſhall be conſtrued liberally and beneficially o the relief of the creditor.

Whether the execution is taken as procuring his goods to be ſequeſtered, or a fraudulent conveyance, *Grey* is liable on either account.

Mr. *Mansfield*, on the other ſide—Mr. *Wigmore* has properly obſerved, That we muſt find the deſcription of a bankrupt in the laws to that purpoſe.

1ſt. The execution was not by procurement of the bankrupt, it was a violent act: It was therefore no conveyance or procurement. The ſtatute of *James* ſays *willing*.

As to the word *attached*, ſuppoſing *fieri facias* to be an attachment really in itſelf, yet it was not a voluntary procurement to be attached. I know, by the ſtatute law, from the time of the writ delivered to the ſheriff, by the common law, from the date of the teſte, the execution relates; but to which ever it be referred, it cannot affect the bankrupt, for it was not his act. This was not of the bankrupt's procurement. Shall we ſay it was from the ſale? It is complained the bankrupt prevented the ſale: So far, then, he rather hinders the attachment. Unleſs Mr. *Wigmore* can prove, that the letting a man continue in poſſeſſion after execution be an act of bankruptcy, there is none here.

29 Car. 2.

As for bankruptcy by relation, there are but two kinds of it that I know by the law: That of being arreſted, and an eſcape; or being arreſted and thrown into priſon.

As to the caſe of *Slater*, it was by colluſion between the bankrupt and the principal creditor. Whether a conveyance can be without deed, I will not go to determine; but the want of a voluntary act of *Grey*'s in the departing from the goods, is ſufficient to throw it out of the ſtatute.

In replication. On the other ſide it was argued, That the agreement was a fraud, by keeping it ſo long ſecret from the creditors; and this by reaſon of an agreement, on account of which *Spotwood* had 1400*l.* by him from *Grey*. The execution ſhall be ſaid to have been procured, as the defendant availed himſelf fraudulently of the execution. Thus a nuſance, by every continuation, ſhall be a new erection. A lawful entry, and an unlawful act thereon, makes the entry treſpaſs by relation.*

Lord *Mansfield*—I ſhould be glad to have all this heard again; it's yet a new caſe. Whether an execution be an attachment, was ſoon determined. Whether the execution was for a *bonâ fide* debt? and, Whether the execution was adverſe? are the two great queſtions.

If the execution was *bonâ fide*, the plaintiff by the ſtatute of *James*, by letting *Grey* continue in poſſeſſion of the goods, loſt them entirely. On a former trial it was proved a *bonâ fide* debt, and the execution was clearly proved; adverſe threatning letters were ſent; delays of execution threatened therein, frequently procured by the defendant. Having then a leaning, which every man ought to have, to catch hold of any fraud there might be in the tranſaction, it being of infinite public concern, I had a doubt, whether there might not be a relation to the time of execution, by the ſubſequent agreement between the plaintiff and defendant, on which the bankrupt preſerved his credit, and had dealings continued with him in the ſhop, by people who had no ſuſpicion of the nature of the tranſaction between them. It may be found, from the circumſtances of the caſe, leſs or more criminal. As if it was premeditated; or on the contrary by repeated intreaties, and out of indulgence, without a concerted ſcheme long before.

I would have the queſtion be, Whether the uſe made of the execution ſhall relate to the 5th of *April*, ſo as to come within the ſtatute of *James*?

I have always underſtood, with regard to conveyance to create a bankruptcy, that ſuch conveyance muſt be by deed.

28 Jan. 1773. Serjeant *Glynn* contended, That the judgment was an act of bankruptcy by colluſion, if the words had been leſs expreſs; for that any colluſion would create a bankruptcy. That by the words of the ſtatute it was ſo: If a trader procure his goods to be attached, it is an act of bankruptcy. The words of the ſtatute of *Elizabeth* an-

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* Qui malo intuitu aliquid facit videtur peccaſſe ab initio.

horize me to ſay it is; and if the ſtatute had not, the ſpirit of the aw would.

Mr. *Grey*, we aſſert, procured the *fieri facias* to be ſerved on him, nd his goods to be levied the 5th of *April*; attachment is ſaid not o refer to execution.

Attachment on meſne proceſs cannot be the evil meant to guard gainſt, nor attachment on the cuſtom of *London*; but an execution is lmoſt the only means, except conveyance of intereſt, which is provided for ſeparately. An execution is the miſchief to be guarded gainſt.

If any perſon procures his goods to be attached or ſequeſtered— Sequeſtration is expreſſed with a view to Chancery proceedings; attachment to all kinds of ſeizure by proceſs of law. It is ſaid, in one of the acts of bankruptcy, that ſanctuary ſhall not be for bankrupts. A ſanctuary was a word ſtrictly defined, with a proper ſtrict application. There was no ſanctuary, in it's proper ſenſe, at the time of the ſtatute; yet, that the words may not be nugatory, they were taken to be meant of places privileged from arreſt. Attachment has no ſuch confined ſenſe: It has been uſed conſtantly, as a much more general word than judgment or execution.

Mr. *Manſfield* has argued the ſtatute of frauds, by which, though formerly relating to the teſte, the title is made good from procuring the *fieri facias*. But in caſe of bankruptcy, the execution ſhall not be complete againſt creditors upon a commiſſion of bankruptcy, till ſale.

Lord *Raymond* 251. Though a writ of *levari facias* be firſt delivered to the ſheriff, yet if the ſheriff executes a writ delivered afterwards firſt, this binds the property, and the party muſt be content to have remedy againſt the ſheriff. The time, I conceive, to prevent a title to aſſignees, muſt be the actual ſeizure of the goods. In this caſe, the very ſeizure is infected with fraud.

Smallcombe *againſt* Croſs and Buckingham, ſheriffs of London.

You cannot, I apprehend, my Lord, ſuffer tranſactions of this kind, and ſay the entry was *bonâ fide*, and the fraud commences at the ſeizure. I hold it to be a ſettled rule of law, That he who enters upon a proceſs of law, and abuſes it to an illegal act, he is a treſpaſſer *ab initio*.

The officer does not appear as a bailiff: Mr. *Grey* carries on his trade as if nothing had happened.

All this muſt be underſtood, therefore, for the benefit of *Spotwood* and *Grey*, by colluſion between them and the bailiff.

Burr. 37. *Rice* and *Serjeant.*

In our caſe here was a long delay, which can't be underſtood as fair; but ſhews that he did not mean to uſe the writ for his recovery of his own debt, but for the purpoſe of ſerving *Grey* againſt the other creditors. This attachment or execution, therefore, is within the meaning of the act; and, conſequently, an act of bankruptcy.

Mr. *Wallace*, for the defendant—The queſtion is, Whether *Grey* became a bankrupt on the fifth of *April*, or no? We are on a queſtion of poſitive law, which has never been extended by any equitable conſtruction. There are many inſtances, where the miſchief has been as great to creditors, and the general intereſts of commerce, as any provided againſt by the ſtatutes; yet on none of theſe can your Lordſhip take an act of bankruptcy to be committed, except where founded plainly in the expreſs words of the ſtatute.

The only words applicable to the caſe are, "If any perſon procures "his goods to be attached or ſequeſtered, with an intent to delay or "defraud his creditors." Attachment is taken by Serjeant *Glynn* to be a proceſs on perſonal goods at law: Sequeſtration, on the perſonal goods in Chancery. There is no ſuch proceſs in Chancery to this effect: There is attachment in ſome of the courts of *London*, and there is ſequeſtration; both by cuſtom. The effect of the attachment is to bind the goods from the ſerving of the writ, though execution be not levied immediately. But Serjeant *Glynn* will have notice of the writ to the defendant. Notice is never given to the defendant. In this caſe an agreement is ſtated after the entry of the officer. Does this make procuring an execution?

The defendant then on the writ, finding that it was intended by *Spotwood* to have execution immediately, intreats him to ſtay execution; for he ſhould be ruined in his trade: "Keep it a ſecret; I "may be able to pay in a few days." *Grey* knew not of the writ; he is frightened with an execution in the houſe. The creditor therefore, is fooliſh enough to forbear his right. Afterwards *Grey*, not being able to ſatisfy the debt, the execution is executed, and the goods ſold. He procures an execution, which came on him on a ſudden, without a ſhadow of profit. A treſpaſſer may be *ab initi* in ſome caſes, where the *quo animo* appears from the firſt by the ſubſequent act.

If a man uſes a diſtreſs as his own goods, the law will ſay, You took it not as a diſtreſs, but to uſe them illegally. So if a man goes into an inn, and takes any of the furniture from thence: You came, the law ſays to him, not to uſe the inn, but to ſteal. If a man ſuffers goods of his own to be in a man's hands, and appea

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e man's own, this does not make the man a bankrupt; but the editors ſeize all the goods. In this caſe there is no enlargement of onſtruction to be made.

Bankruptcy is a crime; conſidered as ſuch by law; and ſubject the moſt heavy puniſhment. Shall another man's act, done ithout my knowledge, be my crime?

Replication.

Serjeant *Glynn*, in reply—The miſchief which it is contended the ct of bankruptcy meant to redreſs, is very ſmall: The miſchief o a creditor, loſing his remedy by a ſecret colluſion, is very great. f this be admitted, the practice will be, to have a creditor in every aſe, take this mode.

Mr. *Wallace* has ſaid, Attachment and ſequeſtration are not applicable to caſes of bankruptcy, and that the proceſs out of Chancery, r by cuſtom of *London*, is ſequeſtration, and no where elſe. I hink, I find ſequeſtration in the Eccleſiaſtical Courts has been taken o be within the ſtatute.

Attachment, I take to be as general a word as poſſible; and hope our Lordſhip will think yourſelf authorized and obliged by the ſtatute, to give it ſo large an interpretation as may at leaſt not provide againſt very ſmall and imaginary miſchiefs, and leave the way open to the greateſt. I am not ſo different from Mr. *Wallace*, in his opinion. I agree with him, that the matter muſt be conſtrued, *ſecund. ſubjectam materiem.*

Mr *Wallace* has argued, That if the ſheriff's officer comes in with the writ at one door, and the bankrupt, by going out at the ſame time at another, commits an act of bankruptcy, the writ is executed by the entry, and the plaintiff has his title complete.

If this be the caſe, then, from the inſtant of the bailiff's entering, the execution thereby made took a taint from the ſubſequent fraud.

As Mr. *Wallace* ſays, You can't ſee the intent of a man's heart, but by his overt-act. In this we are agreed, the plaintiff acts not from the time of his entry: Till *Grey* having by another act openly proved himſelf a bankrupt, it was neceſſary to produce this act, to defeat the remedy of other creditors. Mr. *Wallace* has ſaid, "Shall a common entreaty for delay to levy execution; ſhall this, "when the writ is ſerved on me by another man; ſhall this indul"gence attach fraud to me?" No, certainly, without other circumſtances: But as far as the action is affected with fraud, made evident from the circumſtances of the proceſs, then *Grey* and *Spotwood* are anſwerable together for the whole tranſaction, from the beginning.

ning. The intent of ſuing out the writ is to be interpreted, from the conduct of the parties, to take it's effect accordingly.

Your Lordſhips will ſee, the writ was not brought into the houſe to be executed. I will not pretend to ſay what act preciſely ſhall amount to an execution; but from whatever act we date it, there is an original fraud in the tranſaction, to which the execution and all ſubſequent tranſactions will relate, and which conſtitutes a bankruptcy from the firſt.

Lord *Manſfield*—The queſtion ſent by a feigned iſſue, was to try whether the bankruptcy became ſo the fifth of *April* 1769; or at any, and what time? The words on which this queſtion is argued are 21 *J. c.* 15. "If any perſon ſhall willingly."

I will ſtate the caſe, for the uſe of the ſtudents.

A writ was iſſued out the fifth of *April* 1769, returnable the twenty-third: It was ſerved the ſame day. The jury ſtate, that the execution was not procured by the bankrupt: But they ſay, from the fifth of *April* 1769, (it is admitted excluſively on both ſides) the bankrupt traded as with his own goods: Nothing was done on the writ. Whether, therefore, an execution on the fifth makes an act of bankruptcy, or the evident bankruptcy on the eighth of *May*?

I was of opinion, that attachment and ſequeſtration were not words to expreſs execution. A ſecret execution would not anſwer the purpoſe: For, on a judgment kept ſecret, and execution delayed, another creditor may come in in the mean while. There is ſequeſtration by Eccleſiaſtical Court, City Courts, &c. I ſee none of the counſel took up my opinion. I thought it might be too narrow.

Serjeant *Glynn* has argued, that the conſtruction by the words of the ſtatute ſhall be large and liberal. I ſummed up accordingly.

As I never find a difficulty to change my opinion, I ſummed up accordingly to the jury, that attachment or ſequeſtration may come within the ſenſe of the word execution.

The jury found an act of bankruptcy on the eighth of *May*: A clerk was brought to witneſs, (not a friend of the bankrupt) who proved the debt, on which the execution was taken, was for a more conſiderable ſum of money than was levied. But after, *Grey* kept paying debts to *Spotwood*, which were not in execution; thinking, very miſtakenly, he might avail himſelf of the ſecret judgment. He proved many threats of *Spotwood* againſt *Grey*; but I thought fraud appeared in *Spotwood*'s delaying execution. On the ſecond trial, I expreſſed myſelf as if attachment and ſequeſtration meant execution.

ecution. But, leſt any gentleman might be miſled by a curſory ote on that point, I muſt declare myſelf much more inclined to my ormer opinion. However, I admit procuring the execution may be ithin the act, it is not on that point I found my judgment.

An act of bankruptcy is a crime by poſitive law: Nothing can e taken by conſtruction; though great miſchief happened not ex-reſsly provided for. In the caſe of *Roberts*, the execution there uſt have been fraudulently and wilfully procured, to delay or de-raud his creditors. I am convinced, the execution was adverſe. The aſſignee would have given in evidence, had there been any round of ſuppoſing of an agreement previous to or co-extenſive ith the execution, if they could have proved it. But *non conſtat* when the agreement was made. If it was a day, or hour, or mi-nute later, it cannot be procuring. The agreement indeed acted contrary, and defeated the execution. Accordingly, a ſecond exe-cution was actually levied. It would be very harſh and perilous to draw the line. How many men have been ſaved by the delay of a day or two! Shall it be fraud to delay three or four days, or after what time? The defendant was totally miſtaken in the intent of he execution, which was, that the plaintiff ſhould get his money on the other debt, and then have the benefit of his judgment. He is precluded by the delay: The general law precludes him; and, could that be defeated, the particular ſays, That a man uſing goods of another as his own, the creditor ſhall ſeize them. What remedy the creditor may have by other ways, concerns not this matter. I am of opinion, this was not an act of bankruptcy on the fifth of *April*.

Mr. Juſtice *Aſton* was of opinion, that the words *attached* and *ſequeſtered* are not of execution; but are applied where there is an oſtenſible lien on a ſecret truſt to defraud creditors: Otherwiſe they would have uſed the proper words, [My Lord *Mansfield* had ob-ſerved this] *ſhall procure an execution to be executed*. The ſubſequent tranſaction cannot make it a procuring.

The ſecret execution was, undoubtedly, *delayed* fraudulently; but no fraudulent agreement to make a bankruptcy. The goods in execution are liable for the creditor; and *Spotwood* muſt loſe them. The creditors may have their remedy; as in the caſe of *Rice*: But we have no right to conſtrue this, which is *juris poſitivi*, to be an act of bankruptcy. I expreſs no poſitive opinion on the former point; but I am of opinion on the latter, that it is no bank-ruptcy.

Mr. Juſtice *Willes* inclined to think attachment and ſequeſtration would not take in execution; becauſe arreſt was ſubjoined, on meſne proceſs; ſaid he was precluded from taking the agreement to have been before the 5th of *April*, by the finding of the jury: And whatever he might otherwiſe have thought, he was now bound, by a poſitive finding, from queſtioning that point; and, that being admitted on the finding, he was alſo precluded from conſtruing the act of bankruptcy to refer to the execution on the fifth of *April.*

Mr. Juſtice *Aſhburſt* expreſſed his concurrence with his brothers on the bench, on the doubt of attachment and ſequeſtration, referring to execution. He conſidered the caſe as decided on the other point: The procurement of the execution by *Grey* not being proved, without which no ſubſequent act could make a bankruptcy.

Hatton *againſt* Hooley.

Before the Lord Chancellor, on the Conſtruction of the Effect of a Deviſe of a Codicil added to the Will of Lady Iſabella Finch, *on Appeal from Sir* Thomas Sewell, *Maſter of the Rolls.*

THIS caſe came on to be argued *Michaelmas* term 1772, and was thus:

Lady *Iſabella Finch* gave by her will to *Lydia Hooley* five hundred pounds: She then gave an annuity by a codicil; afterwards ſhe gave by another codicil a thouſand pounds. The words were theſe—"I add this codicil to my will: I give to *Lydia Hooley* a thouſand "pounds."

Mr. Solicitor-general—It is of little conſequence what rule of preſumption is eſtabliſhed, where intention ſtands neutral: But it is of great conſequence there ſhould be ſome ſettled. In the caſe of portions, the laſt declaration of intention has been underſtood to take in the full and whole intention. *Bruin* and *Bruin*, (*Peere Wms.*) and others.

For the caſe of legacies particularly, *Maſters* and *Maſters*. There was reaſon to think an addition was intended; for between the will and codicil the teſtatrix had received a very great acceſſion of fortune. *Duke of St. Alban's* and *Beauclerk*, (*Atkins.*) Lord *Hardwicke*'s opinion in the caſe is incorrect; but we may eaſily conjecture what was delivered. Lord *Hardwicke* went on the civil law, as this court has a concurrent juriſdiction with the eccleſiaſtical: And with the view of ſettling the opinion, four rules are cited from the civil law.

1ſt. The ſame ſpecific thing given twice, can be paid but once.

2dly. Equal ſums of money, or goods of the ſame value, will paſs but once.

Dig. 29. *l.* 12. from *Ulpian. Si eadem ſumma bis ſcribatur div. Antoninus reſcripſit, ſolvendam duplicatam; ſi evidentiſſime probetur teſtatorem ita voluiſſe:* Therefore the legatee muſt prove. Lord *Hardwicke* ſays it's the ſame, by the better authorities, if in a different inſtrument, as in the ſame. *Dig.* If an 100 *l.* be given, and afterwards 50 *l.* if intention be proved, both muſt be paid; if otherwiſe, not: *Idem eſſet ſi in codicillis eſſet factum. Celſus,* however, is quoted as an opinion by Lord *Hardwicke,* ſaying that the heir muſt prove the negative of the intention. *Gothefrid* ſays otherwiſe; and that the heir is bound to the ſmalleſt ſum: *Lib.* 37. *c.* 2. tit. *De Legat.* The caſe is cited. If two copies of a will, 100 *l.* in one to *Titius,* 50 *l.* in the other, *utrumque legatum nequaquam, ſed tantum quinquaginta aurea,* the law of the code *de codicillis* does not ſeem to point. Lord *Hardwicke* cited *Lib.* If a legacy to a daughter by a will, and afterwards a portion, the daughter ſhall not have both.

Another not in the note of Mr. *Atkins,* a more direct authority 34 *Dig.* 1. *l.* 18.

A perſon had ſeveral *liberti*; ſome he had freed by his codicil, others by his will: *Quos teſtamento manumiſerat, iis decem menſtruos alimentorum nomine, legaverat*; and then to thoſe whom he had freed by his will; ſeven by his codicil, and ſeven alſo to the *liberti* he manumitted by his codicil. The determination was, The *liberti* manumitted by his will were not to have ſeventeen or ten, but only ſeven; and it's being ſaid *alimentorum nomine,* Lord *Hardwicke* ſaid, it would make no difference; for might not a man bequeath a double maintenance, as well as any other double legacy?

Celſus, on the adverſe ſide, is the only authority. If it's neceſſary to balance authorities in civil law, *Ulpian* is a much higher authority. *Papinian* is the firſt authority, *Ulpian* the ſecond; they were both *præfecti prætorii* under different emperors. The text, it's ſaid by Lord *Hardwicke,* the text is to be regarded, and not the commentators; the reaſon is alſo very good. Of the commentators, the firſt were ſoon after the finding of the *pandect* at *Amalfi*; theſe were men in moſt barbarous times, about the 13th century. The ſecond claſs were ſchoolmen and caſuiſts; this ſecond claſs we may gueſs the merit of, if it were to be known no other way but by hearing their profeſſion. The third were not practical lawyers, but moſtly *French* and *German* profeſſors; theſe lived in more enlightened times, and ſo far are much preferable to the other two, but will hardly be claſſed with the text. The *Dutch* and *German* commentators took much pains to ſupport what *Trebonius* had vainly boaſted, that not one adverſe opinion was to be found throughout. And *Juſtinian* forbid, as vainly, any man to interpret the code differently; one commentator endeavours to reconcile ſeven hundred different opinions. Among the ancient lawyers there were ſects as among the philoſophers; *Labeo* and *Capito* were of different ſects. One of the commentators ſays, *Legatarius dicitur probare cum non probetur in contrarium*; or to that effect.

If one turns to another ſet of writers, they run ſo much on generals, that it's difficult to make out an opinion; but they agree, that if a gift be twice for the ſame thing, it ſhall be paid but once.

Here is a legacy to a ſervant for ſervice; which, I think, amounts nearly to the ſame thing.

[Will was read.]

30th Auguſt 1768. Deviſe to her brother of her houſe [in *Berkley-ſquare*,] and of her furniture not otherwiſe diſpoſed, charged with diverſe legacies. I "give to my woman *Lydia Hooley* 500*l.* to be paid in three months "after my deceaſe; to her ſiſter 30*l.*" Then appoints executors.

Codicil, 31ſt October 1768. "I Lady *Iſabella Finch* deſire this may be conſidered as a part of "my will: I give an annuity to my ſervant *Lydia Hooley* of 12*l.* for "life, over and above what is given in the will; I give an annuity "of 30*l.* to my ſervant *Smith*, in lieu of what I had given in my "will."

Second codicil, October 28th, 1769. "I add this codicil to my will: I give *Lydia Hooley* 1000*l.*" And further orders, after the codicil to her ſervant *Lydia Hooley*. "I "farther order the ſum of 60*l.* to be paid to *Rebecca Hooley*," [the ſiſter.] Now this caſe, before Sir *Thomas Sewell*, Maſter of the Rolls, was taken to be a legacy of the ſum in the will, and in the codicil.

Mr. *Jackſon*—I am in a worſe caſe than the commentators, who came after the original writers; I will ſay little therefore. It's incumbent on the legatee to prove the intention, for without intention there is no will: What would it be *inter vivos?* A man is in debt 100*l.* he pays the 100*l.* This, though not expreſſed as payment, will in common ſenſe be underſtood payment, and not a gift.

How is it here, a codicil and a will are the ſame inſtrument.

The civil law-books, your Lordſhip will obſerve, are ſingly on the conſideration of two equal ſums; but where the ſecond legacy is an augmentation of the firſt, 'tis eaſy to ſuppoſe the teſtator altered his mind, and encreaſed the legacy in the will. I ſhall only cite one authority to what has been ſo fully argued: *Verius puto u*
probe

obet legatarius; *nam ei qui agit ſemper probatio incumbit*, [The ords "over and above what is given in the will" were relied on, prove a more than ordinary anxiety of ſaying when ſhe gave over d above.]

On the other ſide, Mr. Attorney-general—This is a caſe of a gacy of 500*l.* in general terms; and another, in terms equally geeral, of 1000*l.* by a codicil. I would endeavour to cite what apears to me in the will and codicil, becauſe I think the intent of e teſtatrix may be ſufficiently collected. In her third codicil ſhe ys, "This codicil I add to my will;" this implies an additional leacy. I take it univerſally underſtood, a codicil is taken, *primâ fae*, not to be the ſame inſtrument with a will. *Swinburne*, *Burn*, *entworth*, *&c.* define it to be a leſs ſolemn inſtrument, altering, dding to, explaining, or ſubtracting from a will. *Swinburne* ſays, f there be two wills, the laſt revokes the firſt; but if two codicils, e claimant on each ſhall have equal title: Only *Gothefrid* is of ifferent ſentiment; the *incumbit actori* is, where *legatarius* prouces *duas ſcripturas*, it lies on him to prove both to be the act of e teſtator. But, that proved, it lies on the heir to prove *poſterirem eſſe inanem.* 9 *Dig. lib.* 9. *Lib.* 37. *tit.* 2. where a teſtator has hewn great marks of underſtanding and affection, I think it will e underſtood that by ſuch, where a title is expreſſed in one place to legacy, ſuppoſe, of an 100*l.* and afterwards of 200*l.* both will e underſtood. If there are marks of impoſſibility, and no evidence f much affection, a difference may be taken, and forgetfulneſs leaded.

Where it is ſaid, *Si Titio centum aurei legentur, & in alio ſcripto uinquaginta aurei, utrumque nequa quam debetur, ſed quinquaginta urei tantum debentur*; that is, *primâ facie* no intention appears hich, or whether both, or no, the teſtator meant to give. Thereore, on the common maxim, "*Melior eſt conditio, poſſidentis*" the eir will not be to pay till proof made of title by legatee.

Lib. 37. *tit.* 2. is reſted on the teſtator's intention. In the caſe f the *liberti reſponſu—eſt nil proponi curquæ in codicillis data eſſent æſtari deberent* (*itemque ea quæ in teſtamento prius legata*) *nam ab iis uæ in teſtamento data fuerant cibariorum nomine, receſſum propter leata in codicillis.* Here the queſtion was, Whether he deſigned a ifferent proviſion? And it was ſaid, No.

All that Lord *Hardwicke* ſaid about *Minochius* is, that the *alimenorum cauſâ* did not take it out of the general rule. *Minochius* and *ujas*, it ſeems, were of opinion, that where the ſame cauſe was ſpeified for a legacy in one codicil and another, it would not there be aken as a double bequeſt. A rule is taken, That no codicil can derogate from another, *niſi invicem ſunt contrarii*; this principle, I

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think, ſeems to have been acknowledged by my Lord *Hardwicke*; and then the repugnancy can't be found, between giving 500*l.* in one codicil, and 1000*l.* in another: We are not hurt, but benefited by this rule. We hear much of the authority of the text above the commentators: I am not concerned to deny it; for not one proof againſt us has been produced from the text; nor indeed has any body but *Gothefrid* been produced, I think, of oppoſite opinion to us. But however great the authority of the text may reaſonably be, yet I truſt, in this court, and before an *Engliſh* audience, our own law will have much greater weight.

Pitt and *Pechell.* If there are two gifts to the ſame perſon, they ſhall both ſtand, unleſs one revokes the other; the *probetur in contrarium* was much eaſier with the *Romans*, where witneſs *dehors* the will might be produced to poſſibility and intention.

[*Note*—This is done in our law but much more cautiouſly, and rather to enlarge than narrow the conſtruction, with regard to the deviſee.]

Let me obſerve, your Lordſhip will, that *Swinburne* ſays, he thought, when the ſame perſon is named in one codicil, for a different ſum to what he had given in his other, where there are two, or one precedent will, that the naming the ſame perſon to different ſums is a proof of the teſtator's remembering him.

[The caſe of *Finch* 290. *Mayor and Corporation of London* v. *Ruſſel*, was alledged on both ſides; but it was contended on the ſide of the augmentation, by the counſel, to reſt on the conſtruction of words of the will.]

The caſe in *Atkins*, from the many citations which muſt, I think, have come from Lord *Hardwicke*, muſt operate, I believe, with the determination thereon, as an exception to the general rule in our favour, admitted good. It reſted on this, that the Ducheſs of *St. Alban's* declares her intention of giving to her codicil the full and whole effect of her laſt will and teſtament: Thus ſhe made her codicil and will one and the ſame inſtrument; and on that general idea a double gift could not take effect. The legacies ran double almoſt throughout; there were many ſpecific, ſuch as a gift to *A.* of my ſingle ruby ring; then a bequeſt of what remained, to the care and fidelity of her executor, for the augmentation of Lady *Caroline's* fortune; this, too, is repeated.

I underſtand the rule in the caſe of *Pitt* v. *Pechell*, not to be a matter *juris poſitivi*, ſo as to operate univerſally; but only a collection from the intention conſidered, which can only prevail where intention can turn the ſcale. Suppoſe the rule in that caſe to be the largeſt poſſible; that it repeated only the former legacy, and not ve an accumulated one; yet that would operate as a particular exption, not to ſubvert the general rule. It was obſerved, that the dicil was made above a year after the reſt of the will, merely to ve the legacy in queſtion to *Lydia*. That it is made payable, not three months, but without time; and ſo payable in a year. he teſtatrix, from the care and attention of the legatee in her illſs, might naturally and obviouſly be ſuppoſed to increaſe; ſhe ves it to *Lydia Hooley*, and does not call her *her woman*. She es not ſay, in increaſe of the bequeſt, as had been ſaid in the nuity by the ſcrupulous accuracy of the learned counſel who ew her will, though there unneceſſary; for an annuity could not in ſatisfaction of the 1000*l*. But here ſhe, ignorant of the forms, ds a codicil herſelf; and therefore ſays nothing about over and d above. But as it can't be taken in ſatisfaction of the annuity, hy preſumed in ſatisfaction of any thing elſe, as of the 500*l*? If had been ſo intended, it would have been ſaid, in lieu: Where a queſt is doubled in the ſaid inſtrument, it will be taken a miſtake; t where at different periods, in a different inſtrument, in different uantities, there can be no ſuch preſumption. Where a portion by eed and by will, the children ſhall not have double portions, but ect, whether to take by the deed or by will; becauſe it's *qua poro.* So where two legacies for the ſame purpoſe. Certainly it cannot proved, or implied from the words of the will: She is not called rvant; ſhe was before.

In the caſe where it was ſaid, Whereas I have given to *A*. 1000*l*. now give her 1600*l*. Here was particular notice taken of the rmer bequeſt, and intention plainly expreſſed of augmenting that gacy, not of ſuper-adding a new one to it. I therefore humbly ray your Lordſhip, that the judgment of the Maſter of the Rolls ay be confirmed.

It was obſerved, That by the civil law there was no teſtament ithout an univerſal heir, and the conteſt was between the legatee nd him. If any thing takes this out of that reaſon of the civil w, it will take it out of the rule. The brother of Lady *Iſabella inch* has a particular fund charged with ſpecific legacies; and three oung ladies, his daughters, have the reſt of the perſonalty.

The annuity is not charged particularly, nor the 1000*l*. They are ot charged on the houſe or furniture; and therefore the young dies are liable to them, and they muſt be paid out of their reſiue.

The latter legacy being at all events payable, the only queſtion s of the firſt; and that conteſt is not between legatee and univerſal eir, but between one legatee and another.

Note. It ſeems on the whole, that the 500 *l.* in the will was not thought charged upon the deviſe of the houſe and furniture.

It was farther obſerved, That the bounty of the teſtatrix ſeemed progreſſive; and that the ſlighteſt proof would be ſufficient againſt the preſumption, which was at firſt always made in favour of the heir.

Mr. *Jackſon*—In the caſe of the *liberti*, the uſe of the codicil is properly explained to be, to add, alter, or explain: There it was uſed to enlarge the objects of her bounty; in our caſe to enlarge the bounty. It is true, a codicil is not a part ſtrictly of the will, but an addition made on deliberation to a will. The teſtatrix ſays, "I add this codicil to my will;" ſhe takes notice of it, as if ſhe recited. And therefore, I would deſire your Lordſhip to obſerve, that ſhe gives the 1000 *l.* by way of enlargement of the former legacy; inſtead of the 500 *l.* 1000 *l.* is given. It ſeems to me the caſe of *The Duke of St. Alban's* v. *Beauclerk*, where the Ducheſs begins her codicil by putting the reader in remembrance of her will. 'Tis ſaid, the legacy is made payable at different times; the teſtatrix, writing theſe ſhort directions, might well omit the time of payment here; and we might contend, with as much appearance of probability, that the codicil being to alter and explain, where it does not alter, as in the time of payment, the enlarged legacy is payable at the end of three months.

Mr. Juſtice *Aſton*—Do you recollect *Wallop* v. *Hewit*, where equal legacies were given, 2d Chancery Reports? *Charles* 2. Lord *Shafteſbury* in this court, with the judges, on reading the will and codicil, adjudged both legacies were payable. *Swinburne:* If a ſum is twice bequeathed, it is twice due, if bequeathed in two different writings as a will and codicil; otherwiſe not.

February 6th 1733.

Lord Chancellor, aſſiſted by Mr. Juſtice *Aſton* and the Lord Chief Baron *Smith*. I was not preſent at the firſt opening of Juſtice *Aſton*'s opinion; but he ſeems to have introduced it, by ſaying that there was no internal evidence of intent that could weigh conſiderably. That the rules of law, collected from the *Roman* lawyers, and what he ſhould ſtill have a much higher reſpect for, the deciſions of this court given in ſeveral caſes, would be the only guide. That it had been ſaid the proof lay on the legatee; that a codicil and a will was the ſame as if in one inſtrument; and if two ſums, the laſt ſhould be paid.

Lord *Hardwicke*, on the Ducheſs of *St. Alban*'s will, made a decree upon that caſe, which has been repreſented as a general deciſion, not a decree on particular circumſtances; as taking no diſtinction, in any caſe, between a will and codicil; as laying the whole proof on the legatee, and the ſtrongeſt preſumption in favour of the heir. His Lordſhip, in this and in many other caſes, will ſpeak much more accurately from manuſcript notes. I ſhall therefore premiſe generally, what may ſhew the contrary of this ſuggeſtion, and leave the report of that caſe to his Lordſhip.

1ſt. Where the ſame *corpus* is given by both codicil and will, as the ruby ring. *Cujacius* ſays, *Aliud eſt juris in quantitate, ſi eadem res in eodem teſtamento legatur, bis ſolvi non poteſt, rem conſequetur vel æſtimationem. Legatarius probet, & rem & æſtimationem ſolvendam.*

It was ſuppoſed in argument, that Lord *Hardwicke* declared, that in the caſe of the ſlaves it made no difference; that both were for the ſame cauſe, and the leſs ſum only ſhall be paid: But his Lordſhip cites caſes to the contrary. In the *Dig.* it appears, if it was left 100*l.* and afterwards 50*l.* in the ſame will, both ſhould be paid.

Si quantitas bis legatur, bis ſolvetur, niſi probatur ſecundam adimendi voluntatem fuiſſe.

It ſtruck me as very odd, that when a man in the ſame inſtrument gives twice, it ſhould be forgetfulneſs; and yet this to be at the diſtance of ſeven lines: Notwithſtanding that, in different inſtruments, at the diſtance of a year or more, ſuch a multitude of writers as I ſhall ſhow agree that both ſums ſhall be paid.

With reſpect to the ten *aurei*, and afterwards ſeven; *de ſpecialiter in teſtamento generaliter in codicillis.*

Minochius's rule, too, may be adopted, of both being for the ſame cauſe.

The Chancellor *Langiſſean* has decided upon a ſimilar caſe.

There is another rule—*Si major quantitas in codicillis legata fuerit, majori minor ineſſe videtur*; *niſi legatus aliter probaverit:* But this reaſoning is drawn from the caſe of the ſlaves only. That this rule was applied by Lord *Hardwicke* beyond the ſpecial caſe, I believe you will hardly find, unleſs he was inconſiſtent with himſelf, which is not eaſily believed: He recognizes the authority of *Swinburne*, but here is a difference, "*nam ineſſe videtur,*" he conſiders the two duplicate codicils, with hardly the leaſt variation. With regard to the *Roman* law, where two equal ſums are given by two different writings, there is a great weight of authorities that both ſhall be paid. *Dig. l.* 22. *tit.* 3. *Gothefrid*, That where the ſame ſum, it is a double legacy; *in eodem teſtamento ſi idem corpus bis legatur non niſi evidentiſſimis teſtimoniis, bis ſolvendum; ſed in diverſis ſcripturis.* In different writings, it ſeems then, the preſumption is in favour of the deviſee. And this looks ſo ſtrong, as to imply an idea, that where there was a ſpecific legacy twice given, (the ſtrongeſt, one ſhould think, of all poſſible caſes,) of a double legacy as againſt the deviſee, the deviſee ſhould have *& rem & æſtimationem*; unleſs it could be proved by circumſtances, or evidence of witneſſes, too eaſily received in that law, that the teſtator meant otherwiſe. But in caſe of a ſpecific legacy, Q. Whether this idea can generally prevail; and whether Lord *Hardwicke* has not ſhewn it to be diſallowed in the caſe of *The Duke of St. Alban's* v. *Beauclerk*? *Godolphin*, in his Orphan's Legacy, laſt chapter in the book, laid down certain poſitions for the better underſtanding legacies.

Minochius De Probationibus

Swinburne, *part* 7. *c.* 21. *tit.* 13.

Ricard, a book of authority.

Lord *Hardwicke* affirms the doctrine in *Swinburne*, by diſtinguiſhing the caſe from it.

Upon the two caſes in this court, *Wallop* v. *Huit*, *Newport* v. *Kynaſton*, in the ſame book, the ſame rule laid down; 500*l.* and then 500*l.* in ſilver.

In a leſs ſum, *Swinburne*, and *Godolphin* are clear both ſhall be taken.

Godolphin. If a teſtator in a will gives 100*l.* and 50*l.* in a codicil, and ſays his executor ſhall only give 50*l.* this is a redemption; therefore, had he not revoked, had it exiſted naked, both ſhould be paid.

Can a man know, in a great eſtate, preciſely what he gives? He gives ſo much at all events, and more if he comes to more.

If the firſt be a leſs, and afterwards a greater ſum, (*Ricard*, *p.* 4. Teſtamentary Donations,) what ſhall we ſay, if by the ſame act the teſtator has firſt diſpoſed of a leſs ſum, and afterwards a greater? My opinion is, they ſhall not be blended; it lies in the heir to prove that the intent was not to give both, for the words of the will ſhall have the preſumption in their favour: It is idle to ſuppoſe the teſtator did not know what he had given before.

Wyndham v. *Wyndham.*

Pitt v. *Pigeon.*

Maſters v. *Maſters*

I ſhall only add, That in this caſe, if we take the 1000*l.* as a re-emption of the 500*l.* it is the ſame as if the 500*l.* only had been iven in the codicil.

I think, in this caſe, *Lydia Hooley* is entitled as well to the 500*l.* the will, as the 1000*l.* in the codicil.

Lord Chief Baron *Smith.* After ſtating the caſe, his Lordſhip roceeded nearly to this effect:

On conſideration, I am clearly of opinion with my brother *Aſton.* t ſeems agreed on all hands, that the intent, when it can be ound out, is the beſt rule. Lord *Hardwicke* ſeems to have determined on this ground, in the caſe of *St. Alban*'s.

On the part of the plaintiff, intention in favour of the legatee was argued; on the part of the executors, a perfect neutrality. Taking it as neutral, let us ſee the rule of law.

If in the ſame inſtrument, If equal ſums, the legatee muſt prove them due.

If in different inſtruments, If different ſums, then the executors muſt prove both not meant to be paid. *Swinb.* 125—6, 530. Caſe of *Ruſſel.*

St. Alban's caſe was determined on the particular grounds; nobody can doubt, I think, that the laſt codicil was taken as merely inſtead of the firſt. In that caſe too, the codicil was not a different inſtrument; for her Grace, by the particular words, had drawn the codicil into the body of the will.

Lord Chancellor—I can't help conſidering myſelf very highly obliged to Mr. Juſtice *Aſton* and Baron *Smith,* for their great pains on this occaſion.

It would be unneceſſary for me to ſay any more, than that I am of the ſame opinion. But Mr. Juſtice *Aſton* having put me to ſtate ſome caſes, of which I am ſo fortunate to poſſeſs better notes than are in print, I ſhall principally confine myſelf to them.

When this came before me by appeal, the caſe by Lord *Hardwicke* was ſo urged on me, that I could not help doubting my own opinion in favour of the maſter. I therefore called in ſome of the moſt able judges of *Weſtminſter-Hall*, who bave conſulted more than one or two civilians.

Indeed, this being a matter of eccleſiaſtical nature, we muſt determine, as in every caſe where there is a concurrent juriſdiction, by the laws which direct them: That is, we muſt ſee, what the civil law ſays. We are all agreed, there is nothing of weight in the writing to prevent the matter from ſtanding indifferent; therefore, our rules of intention can have no effect; and we muſt ſee the rules of law.

Lord *Hardwicke* ſays, the caſe divides itſelf into ſeveral parts.

Then he ſays, I am of opinion that in this caſe, upon the reaſon of the thing, the being in a different inſtrument makes no difference, becauſe ſhe has directed them to be taken as one; and as the will and codicil make but one will, and the rule from the text of the civil law, even more certainly than the commentators, ſeems that both ſhould not [if in the ſame will] be paid; therefore, his Lordſhip was of opinion there that both ſhould not.

He does not ſay that the heir is bound to prove the will; but that if he proves the ſecond ſum, *inanem eſſe*, that is ſufficient.

There are words in my manuſcript, that the power reſerved by the teſtatrix made the will and codicil but one inſtrument, *ineſſe videtur*.*

Lord *Hardwicke* conſidered the laſt codicil as merely ſubſtituted for the firſt, as far as they concur, and took them into the body of the will.

In *Swinburne*, ſays his Lordſhip, it is true, in ſome of the inſtances it is ſo, but not in this caſe, (that is, in *Swinburne*, the codicil and will being taken as different inſtruments, diſtinct legacies to the ſame perſon might paſs by each; but here not, the teſtatrix having declared the will and codicils but one inſtrument.)

Lord *Hardwicke* ſuppoſes Sir *Joſeph Jekyll*, in the caſe of *Maſters* v. *Maſters*, to have ſaid, that both were given in the ſame inſtrument; and then ſays, very juſtly, the current of teſtimonies was to the contrary.

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* Verba relata ad id maxime, operantur ut ineſſe videatur.

He ſays, the codicil was proved as part of the will; and the ſecond pecuniary legacy ſhould not be taken, unleſs it was proved it would be ſo if in the ſame inſtrument. The ſecond reaſon, as taken by Lord *Hardwicke*, was, I take, that reaſon on which Sir *Joſeph Jekyll* meant to reſt the addition of fortune as a proof of intention.

Wallop and *Huit* ſtated—200 *l.* given to two by will; and afterwards 200 *l.* to two by codicil: Whether the double was intended, or no, they knew not. Lord *Shafteſbury*, aſſiſted by three judges, (there was no evidence entered into of intention) decreed 400 *l.* apiece to be paid.

Wyndham and *Wyndham*. The teſtator publiſhed his will in ——, and in———: He gave 1500 *l.* to each of his children; and 1000 *l.* to his children henceforth to be born. By his ſecond will he gave 4000 *l.* to his little infant, *John*, who was born a few weeks before.

Queſtion—Whether he ſhould have 4000 *l.* or 5000 *l*? It was contended, the words *henceforth to be born*, had been interlined after the birth of *John*: No ſufficient evidence of this, and parol evidence to the contrary. It was ſaid, that if he had meant to give 4000 *l.* he might have ſaid, in ſatisfaction of all portions. This will was ſaid, as to the laſt part, that it operated as a declaration of truſt: But this was in the 27th of *C.* 2. and the declaration of truſts came in by the 29th. The next caſe, determined by Lord *Nottingham*, depended on the eſtate not being ſufficient for the charities, &c. if twice the ſum was to be paid.

Newport and *Kynaſton*. A will ſpeaks at the ſame time; a codicil implies an alteration.

Pitt and *Pigeon*. "I give to ſuch child as ſhall be living at my "deceaſe 300 *l*." Afterwards he had three children; and by codicil gives 200 *l.* Whether ſhould be good, and to whom? Whether to the eldeſt, or to all three? It was determined, that the will extended to all, and that the codicil made no alteration in the will. That whether a leſs ſum or a greater was given in the will than in the codicil, both were to be paid; unleſs the eſtate was inſufficient, or there was the moſt evident proof of the contrary intention.

I conſulted a very great civil lawyer, whether there was any deciſion there in this matter. His Lordſhip furniſhed me with one caſe, grounded on the *Roman* law, where equal ſums were given.

I have the ſatisfaction of thinking, ſo far from contradicting my Lord *Hardwicke*, we concur with his opinion. In the particular caſe he decided, he grounded his opinion on the will and codicil having been but one inſtrument by the power reſerved. That is the ſtrongeſt internal evidence; the bequeſt cannot be doubted there, either in the nature of the thing, or the intent of the teſtatrix. But the general rule of the civil law, his Lordſhip uniformly recognized; ſuch, I think, as we have taken in the caſe before us.

Decree—That the 500 *l.* in the will, and alſo the 1000 *l.* in the codicil, be paid to the legatee.

Jewſon *againſt* Read.

ON a motion to ſet aſide a judgment for irregularity-------

Mrs. *Jewſon*, a milliner of the city of *London*, and exerciſing her trade as *feme ſole*, claiming this privilege as by the cuſtom of *London*, borrows money of Mr. *Read*, an apothecary, to carry on her trade, to the amount of 9000 *l.* and enters into a warrant of attorney to confeſs a judgment; upon which judgment is entered.

The aſſignees applied, upon the oath of Mrs. *Jewſon* that her huſband was not privy to the proceedings, to ſet aſide the judgment.

It was argued againſt the rule, to the effect as follows:

I ſhould ſubmit to the court, Mrs. *Jewſon*'s aſſigns are her repreſentatives, and entitled to no more than ſhe herſelf: If ſhe come to avoid her own act, ſhe ſhall not do it; and therefore the aſſignees ſhall not for her.

She has not inſinuated the leaſt degree of fraud.

The execution and judgment was objected to, becauſe the declaration was as againſt a *feme ſole* by the cuſtom of *London*, whereas ſhe was a *feme covert*, and ſuppoſed a joint trader with her huſband. An abſurd principle to depend on, this! It was contended; namely, that as a *feme covert* ſhe could ſign a warrant of attorney, and confeſs judgment, it was thought ſhe might as well plead and be impleaded alone: But if otherwiſe, the method of objection would have been by demurrer to the judgment. If the warrant be ſet aſide, we can't come in as legal creditors; we can do nothing to recover our debt. The gentlemen on the other ſide may, either in equity, or by bringing an action. Now it appears y the affidavits, the money was lent her as a *feme ſole*, trading by he cuſtom of *London*.

On the ſame ſide, it was argued in the declaration, ſhe is ſued as *feme covert*, being a ſole trader by the cuſtom of *London*. If it had been true, and ſhe, being a *feme covert*, had been impleaded as a *feme ſole*, the remedy ought to be by writ of error. It is of too great conſequence to Mrs. *Jewſon*, who will be able to obtain no ſecurity, nor recover any thing, if on motion only the judgment be ſet aſide—of too great conſequence to the city of *London*.

The court of Chancery has had a ſimilar caſe before them, upon petition; which they thought much too great for them to determine in that manner. They have therefore ordered an action to be brought on it, which will be tried before your Lordſhip in the next ſitting.

Mr. *Wallace*—I take the ſigning a warrant of attorney in this caſe, to be at leaſt a warrant conditional. I think, even in reſpect of fraud, as we are told, *Read* cannot come in with the creditors, if this judgment be ſet aſide. It's my opinion, it's not a fraud as between them; but as to the other creditors, it may perhaps ſeem otherwiſe.

Your Lordſhip has held, an action upon the cuſtom of *London* muſt be before the courts of the city of *London*. This court cannot take notice of the cuſtom as the ground of action; though in defence they muſt. In a defence it's a part of the cuſtom. Then it ſtands, the cuſtom being laid out of the queſtion, Whether a bond by a *feme covert* is good at the common law? Is this too great a queſtion for this court to determine on? I take it, therefore, on a confeſſed judgment we are in the common courſe: And your Lordſhip will ſee there are no grounds.

[Court obſerved, in caſe of a *feme ſole* entering into a bond, and afterwards marrying, they entered judgment againſt her as a *feme ſole*, whereupon the court ſet aſide the judgment.]

As to the cuſtom, there was a queſtion, Whether upon the cuſtom of *London*, a woman's real eſtate can be affected?

It was held not.

Can a woman who has an huſband give warrant of attorney not to defend herſelf in an adverſe judgment, without the concurrence of her huſband; and in this court, where her creditors cannot ſue her on the cuſtom?

It was properly obſerved, that the huſband muſt join in error. Can the creditors oblige the huſband to join? Might not this be thought a ſufficient reaſon? Was it ever heard there was a caſe of a married woman giving a bond, with a warrant of attorney to confeſs judgment, in the caſe of money which ſhe might or might not apply to her trade; and which, in the inſtant of receiving it, ſhe might give away, or do what ſhe would with it?

But the man will not loſe his diſtribution as creditor. If he does not come in as legal creditor, will he not as equitable creditor? Surely.

With regard to the cuſtom of *London*, and impleading in the city, I read with great attention your Lordſhip's deciſion in *Lavie* and *Cox*; and the court ſaith it not, I think. The court ſaith, A *feme covert* exerciſing a trade wherein her huſband meddleth not, ſhe may be impleaded ſole.

Lord *Mansfield*—In the caſe I alluded to, there was irregularity in her. It was a *bonâ fide* action, on expectation of a near bankruptcy; no fraud. If the huſband has not demanded his remedy by writ of error, he is the perſon entitled to that remedy; and no one elſe can impeach the judgment.* If the aſſignees have a right, they will have the benefit of an action. As at preſent adviſed, I think the cuſtom cannot be proved in this way before the court; nor we take notice of it as the ground of the action. I am of opinion, the aſſignees muſt uſe their action; an action, if they pleaſe, of trover. If it's good by law againſt the aſſignees, there is no ground for the court to proceed (as in equity) in a ſummary way. They have advantage of the judgment and of conſcience. If this is fraud, the aſſignees certainly will take their advantage: And I ſee no other cauſe why the advantage ſhould be taken from the creditor.

If the *feme* had gone from her huſband, and he complained, we then *auditâ querelâ* might have given relief in a ſummary way. And if motion had been on the part of the huſband, we might have done the ſame: But nothing has been ſaid on the part of the huſband.

Let it ſtand over for a few days, that we may ſee what the huſband ſays.

Afterwards, it was argued before the court by Mr. *Cowper*, on four queſtions.

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* Quilibet poteſt renuntiare juri pro ſe introducto.

1ſt, Whether by the cuſtom the obligation was good, without her huſband, on action here?

2dly, Whether the judgment valid?

3dly, Whether the warrant to confeſs judgment by attorney good?

4thly, Whether the cuſtom can be tried here?

There is a difference between acts done by a *feme covert* and an infant: The one is incapable for want of natural judgment; an infant can do nothing but what he is bound to do for the benefit of others, or clearly and indiſputably for its own benefit. A *feme covert* is only incapable for want of liberty, being *ſub poteſtate viri*; but where the cuſtom expreſsly enables her to act, in matters concerning her trade, independent of her huſband, ſhe is exempted from that incapacity, and is under no other. If ſhe may manage her trade, ſhe may ſurely borrow money.

The validity of the obligation, I think, may be evidently evinced. The huſband is not neceſſary to be joined in the action.

The conſideration of the bond was very expreſsly for the uſe of her trade---it was ſo recited.

Whether the appearance by attorney was good, I think, can ſcarce be queſtioned. If ſhe may plead and be impleaded, ſhe may undoubtedly appoint an attorney. Whether the confeſſion of judgment is good, I muſt confeſs I can't find precedents. I was informed, on directing application to the city court, that when a *feme ſole* trader by the cuſtom of *London* confeſſes judgment, it is always entered in the court above.

4th, Whether an action on the cuſtom of *London* maintainable here?

It is admitted the court will allow them, when properly brought in, that they are good matters of defence. If the *feme covert* can contract a debt, that debt follows the perſon every where.

Vide Jemino *and* Burrows.

The cuſtoms of *London* are not the only cuſtoms which have been proceeded on here in actions; yet certainly they are of the metropolis, are therefore of importance, and affect greater numbers; have been recognized in books ever ſince *R.* 2. and have been taken notice of in equity and common law.

Vide 4 Co. 64, 65.

Wilford, chamberlain of *London*, *Cro. Eliz.* 682. Debt on a recognizance acknowledged to the plaintiff in *London*, according to the cuſtom there, for orphanage-money. Cuſtom alledged. All the court were reſolved, it was a good recognizance; and on error in the Exchequer-chamber, judgment was affirmed.

Bird and *Wilford* 464. Upon error on a judgment in debt in the Common Pleas. Error aſſigned; debt upon an obligation, as ſucceſſor to the late chamberlain, and that obligation to a ſole corporation ſhall not go to his ſucceſſor. *E.* 4. *c.* 20. cited; and argued, that as a chattel, it ſhall not go to a ſucceſſor. And the court were of opinion, the obligation was good. And *Dyer* 48. cited; and that it is lawful and reaſonable, the cuſtom being averred to be ſo: Wherefore judgment was affirmed.

When a cuſtom is not contrary to the common law, it's a part of it, and therefore determinable here.

In the caſe cited, the recognizance would have been bad, but the court (if I may ſo ſay) legitimate the cuſtom on a bye-law.

Keſkot and *Brady*, an action of debt in the county of *Cheſter*, which came before your Lordſhip; and there your Lordſhip took notice of the bye-law.

Vide Jemino *and* Burrows.

Lord *Manſfield*—It has been extremely well argued: I would only deſire, Mr. *Cowper*, that you would argue on the objection of the neceſſity of the huſband's being made a party here. Undoubtedly, when a right is eſtabliſhed by the law of *France*, and the party comes here, the debt muſt be recovered here, according to the law of *France*; of which the court will take notice on information upon evidence, and decide thereon. But the queſtion will be, Whether by the common law, the appearance of the huſband joined in the action be not neceſſary, when they come to enter judgment in this court?

It is impoſſible for us to determine the queſtion this term. I ſee a great field of argument open. It muſt ſtand over for next term.

Mr. *Wallace* ſaid, The averment of the money being for her trade, was contrary to Mr. *Jewſon*'s oath.

Mr. *Cowper*—I am ſure Mr. *Read* ſwears every ſixpence was lent for the trade. It is true, Mrs. *Jewſon* employed them on her entering into acceptance of bills of exchange. But on the affidavit it appears, this acceptance was within three years, and this bond was three years ago full.

Mr. *Wallace*—By the cuſtom, ſhe ſhould be impriſoned: For the tachment is not upon her goods, but perſon; and the law would ot receive this cuſtom of ſeparating a wife from her huſband.

Lord *Mansfield*—If that had been the caſe, we could not have ranted execution on the commiſſion.

Mr. Juſtice *Denniſon*'s opinion, in the caſe of *Ballard* and *Bennet*, hat there is a diſtinction between the city of *London* and all other orporations, on account of the modes of recovery, is material.

Caſe cited which Mr. *Cowper* had cited, 1 *E*. 4. *Michaelmas* term, n which a diſtinction is taken of cuſtoms whereon the particular emedy muſt be had in a particular court.

1 *Lev*. 131. Only a *dictum* of counſel: Anſwered, that it was a *dictum* by counſel and judges, that a *feme covert* may be ſued here without her huſband.

Sid. 178. Negative bye-laws cannot exclude the juriſdiction of the courts of *Weſtminſter*.

Action on the cuſtom of *London* for calling a woman wh----: The court took notice of this cuſtom.

Mr. *Buller* took the difference to be between common law in general, and local cuſtoms: That the judges are bound to take notice of the common law, without particular citing; but cuſtoms muſt be particularly cited. On the reaſon of the caſe, a *feme covert* is *quaſi ſole*, trading by the cuſtom of *London*. A *feme ſole* can undoubtedly have her action here: A *feme* trader by cuſtom is not *quaſi feme ſole*, if ſhe cannot ſue here. Beſides, nobody can be tried in the city courts, who does not live within the juriſdiction: Therefore, if any body out of the juriſdiction be indebted to her on account of her trade, ſhe cannot recover.

On the queſtion, Whether ſhe can give ſecurity without her huſband? Mr. *Buller* argued, this was neceſſarily incidental to her trade, with reference to the maxim.*

On the queſtion, Whether the huſband ſhould be ſued? the words of the cuſtom were cited; which provide, that if the huſband be ſued, he ſhall not be liable. This was alledged to be conditional; not compelling him to be ſued with her, but providing for her indemnity if he is; and *cui bono*, that he be ſued, when he cannot be liable.

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* Quoties aliquid cui conceditur, conceditur & id per quod pervenitur ad illud.

Lord *Mansfield*—It is a hard caſe againſt *Read*, who appears *bonâ fide* to have lent the money, and with the privity of the huſband, as it ſeems. But the great difficulty is, how the woman alone, being a *feme covert*, can be ſued in the courts of common law, as ſingle.

The courſe of the law here gives the huſband an opportunity of being heard: And when a local action comes here, it muſt follow the rules of our law. Therefore it ſeems to want ſtrong ſupport of precedent. Notes were not in uſe, nor thought of here, when the cuſtom took riſe.

The huſband being aſked, whether he was privy to the tranſaction of *Read*'s lending the money, ſaid poſitively he was not, nor ſhould he have approved it, nor was he privy to the execution.

Lord *Mansfield*—This conſiderably juſtifies his oppoſition.

This caſe ſtood over, on the neceſſity of the huſband's joining in affidavit.

Mr. *Buller* opened, on a point which the court thought very material: Whether the huſband was privy to the matter?

Mr. *Buller* obſerved, the ſuſpicious behaviour of Mr. *Jewſon*, on his examination laſt term; his heſitation, perplexity, and inſtruction from one of the aſſignees, that he entered the money advanced to Mrs. *Jewſon*, not as the reſt, in the name of *Jewſon*, but *Read*; that he had applied part to his own uſe, in building a houſe; that he left them apart always, to conceal his knowledge; that he had declared, Mr. *Read*, he hoped, would never be deprived of his remedy: Many other circumſtances inducing ſtrong ſuſpicion of fraud.

Then, to the point of joining the huſband in the judgment. If the huſband were to plead, he muſt not be made liable by the cuſtom; if he ſhould be joined, he ſhould not be charged or impeached. To what uſe, then, to join him? It would be to deſtroy, not maintain the cuſtom. Beſides, the huſband, by pleading falſely, might ruin the wife, and bring her to perpetual impriſonment. That the rule, that an action where a remedy is given, muſt be carried on according to the rules of the court where the action is brought, will not be an objection. Here is an action of debt, which is according to the rules of the court, as far as the cuſtom will permit. If there is to be no diſtinction, then a cuſtom is aboliſhed, which is *res ex cauſâ rationabili uſitata quæ privat communem legem*. If the huſband be joined, it muſt be for his or his wife's benefit; or thirdly, for nformity: For his it cannot be, for he is no way liable to any in-nvenience, except his being deprived of the comfort of his wife, ould ſhe be impriſoned; but he knew this inconvenience, and ok his chance of it, and therefore ſhall not be permitted to plead emption from that. If her trade is fortunate, he can at any time t an end to the trade; if unfortunate, by parity of reaſon, he muſt bmit to this ſingle inconvenient rule, to which he might have nown himſelf liable. For the *feme*'s benefit it cannot be. We have ewn before it may be to her great damage. If it ſhould be thought r conformity's ſake, where an equitable relief is deſired, and in a mmary way, your Lordſhip will not think the want of conformity fficient ground to prevent the action here.

Mr. *Wallace*—By the common law, a warrant of attorney by a *me covert*, without her huſband, is undoubtedly void. If they ould maintain their cuſtom, they muſt have come to their relief egularly, and ſued for remedy regularly.

By the words of the cuſtom, where a *feme covert* uſeth any craft f her own money, whereof the huſband meddleth not, ſhe ſhall e as a *feme ſole*, with reſpect to that corporation; may ſue and be ued alone: If ſhe be condemned, ſhe ſhall be impriſoned. The cuſ-om of an execution on her goods (if it be a cuſtom) muſt be im-memorial before the ſtatute of *H.* 3. Your Lordſhip could not have granted a *capias ad ſatisfaciendum*: The ſtatute gave it then on ac-ion of account againſt bailiffs or receivers; that of *E.* 2. gave it in ebt, detinue, and many other particulars. It is ſaid, indeed, on the ntry of the judgment, that it was on money, touching her credit: t is ſaid, but what proof of it's truth?

52 H. 3. commonly called the ſtatute of Marlbridge, c. 23.

2. *Keble* 273. On a queſtion, Whether a *feme* by the cuſtom can ell ale? The court ſaid, whether this could be by the cuſtom, they would not take notice---it may be tried in the city courts: The huſband muſt join here. A *procedendo* was granted in that caſe.

In the caſe of *Lavie* and *Cox*, your Lordſhip and Mr. Juſtice *Yates* were of opinion, on giving judgment, that the cuſtom might be pleaded in defence in the courts here; but not otherwiſe. A ſim-ple-contract creditor, by the book, is in ſome caſes conſidered as a ſpecialty-creditor. Being ſued here, he pleaded the cuſtom; it was neceſſary to be admitted, otherwiſe he was twice liable. No in-ſtance of a *feme covert* giving a bond; of courſe, none of a warrant to confeſs a judgment. Caſes have been cited, where a *feme ſole* may be ſued without her huſband.

Caſes

Caſes of baniſhment or tranſportation, and many others of the ſame ſort, come not the leaſt nigh the point. Baniſhment is a civil death; tranſportation is a temporary death. Mr. Juſtice *Yates*, on the circuit, in a queſtion, Whether a *feme ſole*, whoſe huſband had been tranſported for ſeven years, and was then abroad purſuant to his ſentence, might plead without him?

Mr. Juſtice *Yates* took time to conſider, and afterwards determined, that from neceſſity the *feme* muſt be admitted to plead.

Lord *Manſfield*—I ventured to determine the ſame concerning it, as analogous to abjuration of the realm.

In the caſe of the chamberlain of *London*, the chamberlain was conſidered as a ſole corporation. But, ſay the gentlemen, the huſband has no concern. No, certainly: The wife is to be impriſoned ---What does a divorce matter? In ſome inſtances it is of no account; in others, I believe it may. Mr. *Wallace* ſaid more, very ably to the point. And was followed by Mr. *Davenport*, nearly to this effect:

Mr. *Davenport*---I don't ſee by the cuſtom the *feme* is entitled to borrow. She may buy and ſell as a ſole trader by the cuſtom: I don't ſee any thing further neceſſarily implied by the cuſtom. It will be taken ſtrictly, I conceive, not only by the general rule, but from it's particular nature; which is to favour one creditor, to the prejudice of the reſt.

Nor does the cuſtom intitle the wife, either by words or implication. In a ſuit here the cuſtom legally attaches to place, not to perſon, and is thus diſtinguiſhed from preſcription. This is a particular cuſtom, confined to the city of *London*, exiſting there only: For from the caſe of the chamberlain of *London*, the cuſtom being alledged in the city court, the action and whole proceſs follow of courſe. But in this caſe, from the beginning of the action to the final judgment, the action is regulated by the cuſtom; not a ſtep can be taken without: And it cannot be taken notice of, except in the courts whence the cuſtom originated. A determination was cited referred to *Brooke*, title *Cuſtom*, from the Year-book, diſtinguiſhing between *Gavelkind*, *Borough-Engliſh*, and ſuch cuſtoms, of which the courts throughout the kingdom would take notice, the common law proceeding regularly on the cuſtom aſſigned; and cuſtoms where not the right only but particular remedy was given by the cuſtom, out of or contrary to the mode of proceeding by common law.

Mr. *Cowper*—I endeavoured before to prove the lending money and executing a bond, was incidental, from the nature of the cuſtom;

for if they give her the right, they give her the means. Therefore, farther, ſhe might not only borrow, but give a bond, and of courſe confeſs a judgment.

Mr. *Wallace* obſerves, as deciſive, the ſtatute of *Marlbridge*. But certainly, if the cuſtom did not give remedy, by execution on the goods before, when an act of parliament came, and gave a remedy applicable to the caſe, the court having the matter before them, it was competent to apply the remedy accordingly. For the queſtion concerning the cuſtom of a *feme ſole* giving a bond, we are looking for a needle in a bottle of hay. There has not been one found, there may be many. We applied to the court of the city, the anſwer was remarkable—"That the judgment had always been entered in "this court." It has been ſaid, the conſideration does not appear. I preſume to ſay, being known on record, it muſt be taken to be true.*

As to locality, I admit cuſtoms are ſuch, as to the right they give. But when the law has recognized the cuſtom, it will certainly give the remedy. She is a debtor on this as well as on the other ſide of *Temple-Bar*.

[An attorney of the city courts was called upon by the court, to ſay, whether he knew of a *feme ſole* bringing an action in thoſe courts, on the cuſtom. He ſaid he had known many caſes in which the wife had been ſued without her huſband.]

Mr. *Cowper* continued to ſay, That if the court ſhould doubt, whether the millenery trade was within the cuſtom, they would direct the recorder to certify. If on the matter of law, he ſaid, they ſhall be diſpoſed to contend with us, they may bring their writ of error. It may be ſaid, we pleaded a releaſe of error. I hope the plea was good: It was obtained *bonâ fide*. But the court will be, after all, to judge of the validity of the plea. We, if precluded from this, have no remedy.

Lord *Mansfield*—This is an application to the court to ſet aſide a judgment, as entered up without authority.

Allowing what we will of the extent of the authority of a *feme covert*, trading as a *feme ſole* by the cuſtom of *London*, ſhe enters into a bond, without mention of herſelf as a ſole trader, or of the conſideration of the debt. Then ſhe grants a warrant of attorney, without any mention of herſelf as a ſole trader. The attorney has a long declaration of the conſideration of the debt; of Mrs. *Jewſon*'s being a ſole trader, &c. Had the attorney any right to enter judgment on this collateral circumſtance? Does not this make it without authority? If there were any thing litigable, it appearing a *bond fi* debt, and without fraud againſt the huſband, we would wiſh, in ſ large a ſum, to give the creditor a chance.

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* Nemo poteſt contra recordum verificare per patriam.

The huſband, by the caſe in *Croke*, joins in a ſimple-contra action; and he has a great intereſt, that he may not be deprived o her ſociety.

Does the cuſtom empower her to enter into a bond to bind he heirs? Suppoſe ſhe had a great real eſtate, does the cuſtom empower her to make executors? Here's a trader as a *feme ſole*, dealing on paper-currency to 70,000 *l.* The notion of this would hav ſtartled the city at the time of making the cuſtom: But this refe to the other ſecurity. Upon the bond for this 9000 *l.* does it no change the nature of the debt? A bond given by a *feme covert* is voi by law; has the cuſtom ſaid any thing to ſupport it? Certainly not Is there a ſingle caſe, where a *feme ſole* trader has given a bond Is there one where ſhe has anſwered an action without her huſband The cuſtom declares ſhe ſhall join, only providing for the ſecurity o the huſband. If ſhe cannot by the common law, nor, as appears by the cuſtom, be ſued herſelf without her huſband, can ſhe make an attorney? *

The cuſtom ſeems to ſay nothing of the execution of the goods The reaſon may be, that they live under the ſame roof; their good are therefore mixed. Therefore there was a fault in entering judgment on execution, if that ground be good.

On the whole matter, the court was unanimous, That the good unſold be reſtored; and the value of thoſe ſold, in the hands of th ſheriff, be reſtored; and that the huſband appear in court, and hi concurrence be mentioned in the rule. JUDGMENT WITHOUT COSTS.

Bail.

Good debts may be conſidered as part of effects of bail, and yet they are a choſe in action.

BAIL was aſked, what he was worth; and ſaid, 100 *l.* Being then aſked, where it was; he ſaid, in the hands of his cuſtomers. Allowed ſufficient, if the debts were good debts.

Information and belief good on an affidavit againſt bail, when the matter in it's nature is matter of information and belief.

OBJECTION to bail, that one of them was a lieutenant o a marching regiment, which, by affidavit, the deponent ſays he is informed and verily believes is in *America*, and therefore th ieutenant likely to be compelled to join it immediately. This ob-ection on information and belief not admitted.

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* Nemo poteſt plus poteſtatis in alium transferre quam in ſe habeat.

BAIL ſaid, he had an eſtate of 50 *l.* *per annum* in *Yorkſhire*: They ſaid, it was become a faſhion to ſwear to eſtates in diſ-ant counties.

Lord *Mansfield*—Then if he ſwears falſely, you muſt indict him.

If a man offering himſelf as a bail, will ſwear he has effects in ſuch a place, he is not to be rejected; but you may indict him for perjury.

Entry of Judgment.

WHEN judgment is entered at a time when by the rules and practice of the court it may be entered without irregularity, the party ſhall not be admitted to ſay it was ſooner entered than it ſhould have been; and, under that pretence, entitle himſelf to begin again without coſts, by calling it a *ſnapping judgment*.

A regular judgment not to be called a ſnapping judgment.

Lord *Mansfield* ſaid, he did not underſtand the application of that expreſſion, as *applied to a regular judgment*. That they might, before the expiration of the time for ſigning judgment, have moved for an enlargement.

Sheriff.

WHERE a ſheriff comes to levy execution, and the party againſt whom the writ went declares a *bonâ fide* aſſignment for debt, and thereon poſſeſſion of a ſtranger, the ſheriff may impanel a jury to try the poſſeſſion.

Maxim.

THE maxim, *Qui peccat in ſyllaba peccabit in tota cauſa*, was taken notice of from the bench as reprobated, in many inſtances, by ſeveral acts of parliament. *Vide* 52 *H.* 3. *c.* 11. 14 *E.* 3. *ſt.* 1. *c.* 6. 9 *H.* 5. *ſt.* 1. *c.* 4. 4 *H.* 6. *c.* 3. 8 *H.* 6. *c.* 12. *ſ.* 2. & *c.* 15. 5 *G.* 1. *c.* 13. 8 *H.* 6. *c.* 12. *ſ.* 2. 8 *H.* 6. *c.* 15. 6 *G.* 1. *c.* 21. *ſ.* 10. 5 *G.* 2. *c.* 19. of amendments. Of *jeofails*: 36 *E.* 3. *ſt.* 1. *c.* 15. 8 *H.* 6. *c.* 12. *ſ.* 1. 32 *H.* 8. *c.* 30. *ſ.* 1. Of miſpleadings aided by verdict, *vide* 18 *Eliz.* *c.* 14. 21 *J.* 1. *c.* 13. Of want of form; not to arreſt judgment after demurrer, *vide* 27 *Eliz.* *c.* 5. 4 *An.* *c.* 16. *ſ.* 1. With an exception, however, of certain criminal caſes, *vide* 13 *Eliz.* *c.* 14. *ſ.* 2. 27 *Eliz.* *c.* 5.

c. 5. *ſ.* 3. 21 *J.* 1. *c.* 13. *ſ.* 3. 16 & 17 *C.* 2. *c.* 8. *ſ.* 2. 4 *An.* *c.* 16. *ſ.* 7. 5 *G.* 1. *c.* 13. *ſ.* 2. Of defects in form amendable, ſee farther, 27 *Eliz.* *c.* 5. *ſ.* 2. Of judgments by confeſſion, 4 *An.* *c.* 16. *ſ.* 2. Of revenue of the crown, 4 *An.* *c.* 16. *ſ.* 24. Mandamus and information, 9 *An.* *c.* 20. *ſ.* 7. Proceedings in *Engliſh*, 4 *G.* 2. *c.* 26. *ſ.* 4. Of judgment after verdict, *vide* 16 & 17 *C.* 2. *c.* 8. Vide *Ruffhead*'s Index to the 9th vol. but above all, in direct application, *vide ſtat. de Wallia*, 12 *E.* 1. *Ruffhead*'s Appendix, p. 9. *Cum vero deforciens comparuerit, quia per verba brevis non poteſt ſciri petitio petentis eo quod multe et quaſi infinite ſunt rationes petende neceſſe habet ille qui petit quod narret verſus deforcientem, et exprimat rationem petitionis ſue,* et hoc per verba veritatem continentia ſine calumpnia verborum, et non obſervatâ illâ durâ conſuetudine, "*Qui cadit a ſyllabâ cadit a totâ cauſâ.*"

Miſpriſion of words.

WHERE the jury find a greater ſum than that laid in the declaration, *il ſemble* the verdict cannot be amended by making the ſum equal to that in the declaration; and the caſe of *Wray* and *Liſter* was cited. And it was ſaid, a declaration in *debet* and *detinet* againſt an executor could not be amended by ſtriking out the *debet*, and retaining the *detinet* only.

Indictment.

INDICTMENT maintainable for fraudulently obtaining goods, under pretence of a treaty of marriage.

Warranty of Goods.

IF a ſeller warrants an horſe ſound, he does it at his peril if the horſe was not ſound at the time of ſale; whether he knew it or not.

The court, in a caſe of this ſort, did not chooſe to grant a new trial; though the judge who had preſided at the trial expreſſed himſelf rather inclined to the ſide of the plaintiff, and the jury had found for the defendant.

Lord *Mansfield* ſaid, the courts were uſually enough troubled at the firſt trial in ſuch matters: That it was neither clear enough, nor important enough, to anſwer a ſecond trial.

The counſel on the ſide of the plaintiff deſired a new trial; on
ggeſtion, that the perſon who ſummoned the jury was a bailiff and
houſe-keeper, and for that reaſon might well have influence over
e perſons he ſummoned, on both theſe accounts:* That the horſe
as admitted to ſhew for twenty, and yet was bought by the defen-
nt for twelve; and that this was a ſtrong preſumption of his un-
undneſs: That the plaintiff was no jockey, and the defendant was.
hat the plaintiff had ſuppreſſed evidence of unſoundneſs, which
fairneſs he ſhould not.

Lord *Manſfield*—It does not follow in every caſe, where the weight
f evidence may ſeem rather againſt the verdict, that a new trial
hould be ordered. There is no nice point of property.

Not every cauſe where the evidence ſeems to preponderate againſt the verdict, is a cauſe for a new trial.

The plaintiff aſks, that he may be at the expence of 20*l.* at
aſt, for the chance of twenty, which is the whole value of the
orſe. *Uncertain juſtice by a verdict is much better than certain in-
uſtice:* Which latter, I think, would follow, by granting a new
rial where there is contradictory evidence beſides.‡

Uncertain juſtice better than certain injuſtice.

Agreement to abide the Event.

WHERE there is an agreement of many cauſes to abide the fate of one, for the expedition of juſtice and the great benefit of the parties, it is to be, on a determination of that one to the full ſatisfaction of the court.

Where cauſes are conſolidated, the verdict which ſhould bind the reſt ought to be fully ſatisfactory to the court.

Bail.

PROPERTY abroad, where the ordinary writs of the crown go not, ſignifies nothing, though to any amount.§

King *againſt* Jackſon.

THE court refuſed to grant an information againſt *Jackſon*, a juſtice of the peace, for forcing one *Rawlinſon* to marry a woman whom he does not deny to have got with child; but ſays,

The court will not puniſh in an extraordinary way, where the act complained of was occaſioned by fault of the complainant, and he is obliged to do that juſtice he ought to have done himſelf, if the matter does not appear malo animo, but will leave him to his ordinary remedy.

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* Quod fieri non debuit, factum valet.

‡ Lex vult potius privatum incommodum quam publicum malum.

§ Fruſtra quid alicui conceditur niſi concedi poſſit & id per quod pervenitur ad illud. Lex nil facit ſupervacue.

he was not willing to marry, ſhe having had two baſtard childr before her marriage, neither of which belonged to or were father on him. The force the juſtice uſed was threatening to commit if did not marry her. But the court diſcharged the rule; obſervin "*That though the juſtice might be thought to have ſpoken haſtily,* "*either to marry the woman he had got with child, which he ought* "*do after the injury, or to indemnify the pariſh, was what by law th* "*were entitled to require of him: On refuſal of one or other of whic* "*they certainly would commit him.*

Rule diſcharged, without coſts.

Bail.

The value of the houſe not material in bail.

IT was ſaid, a man muſt rent a houſe of 10*l.* *per annum*, to b taken as bail. Mr. Juſtice *Aſton* ſaid, the rent was immaterial i this caſe; for his being an houſe-keeper was only required, th they might know where to find him; his other effects were t anſwer, and if he had ſufficient of them it would do.

Mandamus.

APPLICATION for a mandamus to admit a burgeſs; o the other ſide, they offered to admit without a mandamus.

The court would not immediately grant a mandamus, till i ſhould appear by their refuſal that a mandamus was neceſſary.

The King *againſt* Denniſon.

ON a motion for an information, grounded againſt the defendant for a letter, accuſing a noble Lord *inter chriſtianos innominandi flagitii, & quod non proficit ſcire.*

The letter was full of indignation; expreſſes great complaint o injury; great and ungrateful injury, done to his character; threatens, if driven, to bring matters to light which would make this climate very diſagreeable to his Lordſhip: That from attachment to the family he does it with reluctance, and from obligations to his Lordſhip. How muſt his Lordſhip bluſh, he aſks him; and how muſ the world; if he ſhould divulge, his Lordſhip ſolacing himſelf with his moſt menial ſervants: If thoſe deteſtable practices ſhould be diſcloſed, what would be the conſequence!

He requires an indemnification for all his expences, and a good title in law to be made for an houſe; which, he ſays, his Lordſhip

had

promiſed to let him for twenty-one years, and requires farther indemnification for the injury done to his character.

It appeared that the defendant had been confeſſor to the infor-nt; and that about two years ago he had renounced and became roteſtant.

It was ſtated, that afterwards he went and lived on a curacy of *l. per annum*, in *Eſſex*, at a diſtance from his Lordſhip; and was duced, as he ſuggeſts, by his Lordſhip, of theft, perfidy, and get-g a baſtard child: That then he wrote the letter; and it was alledg-, as againſt the information, that the crime, whatever it might be, e informant does not juſtify by declaring his innocence. That the fendant, not as confeſſor, but as a domeſtic, was witneſs of inde-nt practices, which he does not think himſelf obliged particularly diſcloſe, but ſhall be able, if neceſſary, to prove them, by him-f and many witneſſes.

That where the party did not appear innocent, an information as not uſually granted.

Rex *v.* Peach and others.

Rex *v.* Athay.

Bur. 548. It appeared, the parties applying were cheats, as well thoſe applied againſt. Application rejected. *Bur.* 653. The court id, the party not having ſworn to his innocence, the application muſt e rejected.

Juſtification of the truth not good to an information. Vide 5 Rep. 125. De Libellis famoſis. ſec. 4. Hobart 252—3. Lake *v.* Hatton.

Lord *Mansfield*—I am ſorry to ſee theſe fruits of converſion; is man was a confeſſor to his Lordſhip. [Then his Lordſhip ſtated e crime charged as perpetrated, or at leaſt attempted.] In this ode of application, even juſtification of the truth of the fact will ot do. This man, if he had not been a convert, is ſtill liable to e called a jeſuit, from his manner of defence, ſaying, by means ex-cluſive of confeſſion; what does that imply? That his Lordſhip as been guilty of very indecent practices. Why does not he ſpeak ut!

It is true, this is an application for an extraordinary remedy; and therefore the court will not grant it lightly: But they will do juſtice; nd therefore they will not withold it, if the nature of the caſe equires it.

As to the caſe of challenges; where it appeared the challenger rought an information againſt the party accepting, there the court ould not grant. In the caſe of a man convicted for ſelling ale ithout licence, there, on legal conviction, the man not being able o ſay he was not guilty, the court would not grant ſuch a remedy or informality only.

Beſides, for argument ſake, admitting the crime, here is a letter to extort money to compromiſe a felony.

As to the objection to his Lordſhip not anſwering, here is an accuſation ſo general, that it hardly admits a direct anſwer; becauſe there was no ſaying, eſpecially if his Lordſhip be innocent, what was to be charged.

LET THE RULE BE MADE ABSOLUTE.

And I think there never was a more odious attempt to ground an information on.

Mr. Juſtice *Aſton*, to the ſame effect nearly. He concluded, with obſerving, that the defendant, from a catholic confeſſor, ſeemed to have become a proteſtant extortioner.

Mr. Juſtice *Aſton*—It ſeems very odd, if there ſhould be a rule, that on application for an information, the party applying ſhould declare his innocence againſt a general charge; when, on information granted, you cannot juſtify for the truth: That he was of the ſame opinion with his brethren for making the rule abſolute. He concluded, with ſaying, the defendant was alike criminal, be the charge true or falſe. If true, why did he not proceed by indictment? Why is the whole affair to end by compromiſe? If falſe, what is it but a moſt ſhocking calumny to extort money?

Note. What ſeems remarkably particular in this head, is, the defendant in the cloſe of his letter offers, that if his Lordſhip makes him the title to the houſe, and gives his character the indemnification deſired; the truth ſhall never be known, his Lordſhip's character will be eſtabliſhed; party diſguſt will gradually ſubſide. And that he ſhall be glad to ſhew his Lordſhip, that no body has a more ſincere, tender or grateful affection for his Lordſhip, nor more willing to do him every ſervice, nor more reluctant to do him any hurt; which profeſſions fall under the ſame dilemma with the circumſtances noticed in the precedent obſervation.

Foreign Judgment.

Vide Burrows *v.* Jemino, 2 Strange 733.

YOU can't bring an action on a foreign judgment, as judgment, but you may bring an action of debt, and give the judgment in evidence.

Attorney

Attorney of the Court.

NOT to be held to bail in civil caſes; for he is always *in curia.*

Hilary Term, 4th February 1773. Cur' Canc'.

Injunction muſt be againſt preſent waſte.

AN injunction was moved on affidavit, ſuggeſting that *A.* had not accounted to *B.* as he ought to have done, for the rents he had received, and the wood he had cut down.

Lord Chancellor—There is not a word in your affidavit to ſupport your motion. *An injunction is to ſtay preſent waſte.* You complain not that the party is cutting down wood, *&c.* but that he has not accounted for the rents he has received, nor the wood he has cut down.

Order of Niſi Prius.

ON motion to make an order of *niſi prius* a rule of court, it was moved, that the court would permit certain explanatory word to be inſerted. But the court directed the words applied for ſhould be made a ſeparate rule.

Coote *againſt* Thackerary.

ON an action on *aſſumpſit* to recover a certain ſum, on a quantity of hops ſold to the defendant; it appeared the plaintiff had made a difference of 210*l.* to his advantage. The jury, however, found for the plaintiff; and a motion was made for a new trial, on the ground of exceſſive damages; and the rather, becauſe ſeveral actions had been conſolidated into one.

It appeared, that the plaintiff ſold the ſame quantity which had coſt him 6*l.* 18*s.* the ſame day for 7*l.* 10*s.* and that he had bought hops about the ſame time for 7*l.* 5*s.* with a view to raiſe the ideal value.

Lord *Mansfield*—The conſolidating of ſeveral actions into one is certainly of very great public utility. Formerly, if there were ever ſo many actions on the ſame cauſe, the jury found ſeparately on every one. You may, ſome of you, remember, that old *Craycroft* made a great ſtand againſt the introduction of this rule. When I propoſed

poſed it, he could not give it up without his client's conſent; th right of an *Engliſhman* to try an hundred actions, if he thought fi He went at laſt to conſult his client (it was the laſt day of term) We thought he would not bring back his client's conſent; he cam very late, and refuſed. On this, I directed the rule to be drawn up with leave of *imparlance* in all the actions but one. *Craycroft* the deſired he might have a diſcovery of letters, which he had been offered before; and then took the rule, for conſolidating the action in one, without writ of error or bill in equity. A day or two after the defendant in the cauſe came to me, as I was ſitting in *Guildhall* ſaid, he had the greateſt obligation in the world; that he though he had been deſired to give up ſomething, he did not know what to his hurt, as he then imagined; on the contrary, he had, withou trouble, without expence, been at once admitted to recover 2500*l.*

Not every miſtake of agents, counſel, or witneſſes, is a ground for a new trial; but the real merits of the cauſe not being ſatisfied, is. Vide Bright *v.* Eynon, 393. Vide 4 Blackſtone, c. 33. ſ. 5. 3 Blackſtone, c. 24. p. 387, 392. 8vo. edit.

It is not to be denied, that not every miſtake or omiſſion of agents, counſel, or witneſſes, is a ground for a new trial: But if the real merits of the cauſe appear clearly not to have been conſidered, there is then moſt clearly ſufficient ground.

In this caſe, the counſel for defendant examined a witneſs or two, and reſted the affair, as they well might, as to that action, on the ſingle, ſtrong circumſtance, of the plaintiff himſelf, on the ſame day, buying at 6*l.* 18*s.* ſelling at 7*l.* 10*s.* Had I been apprized, that ſo many other actions depended on the event of this, I ſhould much have been deſirous of entering into the whole evidence. It might have availed them; it might have had an oppoſite conſequence: But the witneſſes they had a right to produce. I remember, upon the trial, one of the parties, I forget whether witneſs or defendant, ſtarted up as if he had been ſhot, and ſaid, in vehement expoſtulation to his counſel, when he heard the jury were going to find their verdict, "Sir, we have an hundred witneſſes to produce! "What did you mean!" Poſſibly, the witneſſes who remained would have had ſome material effect as to the other actions, (where the *argumentum ad hominem* was not equally concluſive) by ſettling more generally the price of commodity.

I could wiſh I were authorized to ſay, that the courts of law would afford no relief to either party, when engaged in theſe ſpeculative contracts. But gaming, in all it's ſorts, is too big an evil for the regulation of poſitive law. Subject it to that, and the event is, you reſtrain it not at all; but the honeſter party ſuffers doubly; and the knave eſcapes and triumphs. The former loſes, he pays; it is a debt of honour: The latter happens to loſe, then the condition is changed: I would have taken, if I had won; but now, I'll pay you in law. *This is gaming very high indeed*; *tends to a monopoly*; *enhances the price of one of the neceſſaries of life*; *and therefore merits all the diſcouragement we can give it.*

It has been objected, that the plaintiff will be at a great expence: For my part, I have no objection, when gaming is put in practice, that both ſides ſhould diſpoſe of part of their money in *Weſtminſter-Hall.* The plaintiff, if he has expence, will have it only in damages; the defendant, at all events, will have the coſts to pay. And I ſhall be perfectly well ſatisfied if the trouble, and ſome ſhare of the expence, fall on both, that they may learn on each ſide, to quit theſe methods of gain, and apply themſelves to a more certain and ſafer, as well as more honeſt way of livelihood.

Juſtice *Willes* was for letting in a new party, who might not have the perſonal objection againſt him as *Coote.* Lord *Mansfield* ſaid, that was not neceſſary, as he would take care to inform the jury, as to the other parties, that his conduct, in ſelling at one price and buying at another, was not to be taken againſt them, as *argumentum ad hominem*; but as inſight for ſettling; and that it might go to eſtabliſh the price for 6*l.* 18*s.*

Mr. Juſtice *Aſhburſt* ſaid, he ſhould not have been for a new trial, though perhaps he differed from the jury; (there was contradictory evidence, and then it was their right to chooſe) had it not been that ſo many other actions depended on it, which it was very hard to preclude the parties, by judgment by default. He obſerved, the counſel did what the experience of the court muſt juſtify: *Would not weaken ſtrong evidence, by adding to it.* That he ſhould not therefore condemn him; but thought, that the witneſſes, collectively, might be of conſequence, as to the other actions, which were to abide the fate of this.

Bail.

NO ſheriff's officer, or other perſon concerned in execution of proceſs, ſhall be bail in this court.

Notice to Leſſee.

ON a queſtion, Whether a landlord may not recover what rent he ſhall have demanded in a notice to quit, in caſe the tenant does not quit at the term.

It was objected, that by the ſtatute of 4 *G.* 2. *c.* 28. If any tenant for term of life or years, hold over beyond the expiration of the term, the landlord ſhall recover double damages, by an action of debt, for the yearly value. Defendant muſt put in ſpecial bail, and ſhall have no relief in equity: That this was a very favourable act

If landlord gave tenant notice to quit, or pay ſuch a rent, and tenant holds over, landlord may bring an action for uſe and occupation, and ſhall recover the rent ſpecified in the notice.

for the landlord; he muſt therefore keep within the terms of it, and not come for a remedy of his own invention.

Lord *Mansfield*—A man cannot hold over in ſpite of his landlord, and at a rent different from what is demanded.

Note. It ſeems, therefore, in action for uſe and occupation, th landlord may recover the new rent ſet in the notice; and tha holding over afterwards is an aſſent to that new rent.

Crawford *againſt* Witten.

DEBT brought by adminiſtrator on a foreign judgment. I was upon a debt on which judgment had been entered in the Mayor's Court of *Calcutta*.

On demurrer plaintiff aſſigned cauſe, on non averment of letters of adminiſtration.

2dly, That an *aſſumpſit* does not lie here in *England*, on a judg- ment recovered in *Calcutta*, becauſe they are governed by differen laws, of which we cannot take notice in the courts in *England*.

Suppoſe gaming lawful in *Bengal*, and debt thereon recoverabl in *Bengal*, would the court here create an *aſſumpſit?*

Vernon 540. In the caſe of a note given, the ſtatute of limitation was pleaded: The note was given abroad. The Lord Keeper declared, that the ſtatute of limitations could not be pleaded; but *indebitatus aſſumpſit* might be pleaded. This laſt was not judicially determined. [It was not before the court.]

If we admit an *aſſumpſit* in any caſe, we muſt admit upon every foreign action the laws of every nation, however repugnant to thei of *England*.

Lord *Mansfield*—I believe there is but one caſe determined on the point, which was in Chancery, and, I think, deciſive for the plaintiff: But, *I think there is no need of any—on a promiſe confirmed b judgment in a territory ſubject to* Great Britain, *the court will not loo whether gaming is lawful at* Bengal.

Mr. Juſtice *Aſton*—The court has no doubt about the matter; and they admitted the *aſſumpſit* by their demurrer. When an action comes properly before any court, it muſt be determined by the laws which govern the country in which the action accrued.

Information.

Information.

N the caſe of a very poor perſon, Lord *Manſfield* obſerved, that proceeding by information was not the proper manner. On the e of a *Leiceſterſhire* fidler, brought up by information, Lord *nſfield* obſerved, the ground of this rule being laid down by the rt, was taken.

Information.

F a charge is ſimple, and denial has other circumſtances coupled with it, which are not in the charge, it induces a violent pre- mption, that the denial is evaſive and deceitful.

A denial coupled with circumſtances in anſwer to a ſimple charge, infers ſuſpicion of fraud.

Stamps.

T was queſtioned, where there is one plaintiff, and ſeveral defendants, and eight different debts aſſigned on affidavit, whether he ſtamps be neceſſary to all eight ſeverally, with penalty on each or omiſſion.

Lord *Manſfield*—I will not, without an authority, ſuffer the conſtant practice of this court for thirty years to be broke through, nd not of this court only, but, the maſter tells me, of the Common Pleas; eſpecially when the expence to the ſuitors would be ſo normouſly encreaſed.

Amendments.

ALL rules to amend, are with payment of coſts.

Compoſition on a penal ſtatute, where the whole penalty is to the party grieved. Action on 32 *G.* 2. which gives 50 *l.* to the party grieved by bailiffs in arreſt, extorting unjuſt fees, or any other malbehaviour of bailiffs to perſons under arreſt: And it was queſtioned, whether the party grieved could compound without leave of court? The court was clear of opinion, according to my note, that they might——*Sed qu.*

Compoſition where the whole penalty is to the party grieved.

Coſts

Coſts.

Privilege.

MOTION, That the defendant's attorney might pay coſts, the defendant being a Member of Parliament.

The court would not grant the rule, but ſaid, the proper proceſs againſt a Member was by ſequeſtration; and that it would hurt the practice of the court to grant the rule.

Rex *againſt* Curril and others.

ON a motion for a new trial, on indictment for conſpiracy, the defendant having been found guilty.

It was on charging one *Farral* with forging a will, under which he took a pecuniary intereſt. The draught of the will was in the teſtatrix's hand writing. Divers expreſſions of *Curril* teſtified, that he had done for *Farral*, and, that on *Farral* being committed, one of the defendant's ſaid, "We ſhall be ſoon worth 500 *l.*" And that *Curril* ſaid, "We muſt take poſſeſſion of the hotel," meaning *Farral*'s houſe. Again, that *Curril* ſaid, on another occaſion, "I "have done the job: We muſt take poſſeſſion of the bagnio," meaning *Farral*'s houſe. That he ſaid to *Farral*'s wife, "I have "authority to ſeize the goods; for your huſband will be hanged: "And you will ſee him go up *Holborn Hill.*" That Mr. *Eyanſon*, who had been employed as an attorney for *Curril*, being told, that it was a felonious affair, left it, and would have nothing to do with it.

This and more evidence was reported by Lord *Mansfield*, on the ſide of the proſecution.

On the ſide of the defendant, the evidence reported was nearly this:

That one of the witneſſes had ſaid, he thought there was room to litigate the will.

Another ſet of circumſtances of ſtrong evidence againſt *Curril* was, that of one *Lee*, that the will of the teſtatrix was produced before *Curril*, the draught of it all in her own hand writing. That *Curril* not only ſaid he had authority to ſeize the goods, but pretended a falſe authority from Sir *John Fielding*, and thereon got *Iriſh* chairmen to carry them off.

Lord *Manſfield* cloſed his report by ſaying, "There is very ſtrong "evidence; and the jury found *Curril* guilty: And I can ſee no "ground for granting a new trial."

The counſel for the defendant employed much time in endeavouring to exculpate the defendant, as acting haſtily and improperly, but not maliciouſly. And he went on by ſaying, that whether the evidence was ſufficient to ſupport the charge, muſt be left to the court. In criminal caſes the cuſtom of ordering new trials is as ancient as we can trace back by the books. In civil caſes the jury were ſubject to an attaint, which made new trials come in much ſlower. *

* So they were in criminal, vide Hale's Pleas of the Crown.

Lord *Manſfield*—Can you ſhew that? For I thought the firſt new trial in a criminal caſe was granted in the caſe of the *Jew*—the *King* and *Goddard*, before Lord Chief Juſtice *Lee*.

The counſel cited *Levinz*, in which a motion for a new trial, on the part of the King, was made: But there it was ſaid, that the defendant being acquitted, ought not to be tried again, and put in danger. Juſtice *Wyndham* thought this not neceſſary to be obſerved, as it was not matter of death: But the court ſaid, *in all criminal caſes that rule held; but that if defendant had been convicted, there might have been a new trial.*

Lord *Manſfield*—I don't find one before Chief Juſtice *Lee*.

It was admitted afterwards, that none had been actually granted before.

Lord *Manſfield*—*There is no doubt now, that now-a-days, on proper ground, we would grant a new trial.* But there was not a tittle of ground for the charge [againſt *Farrall*.] If they had meant ſavourably, they would at leaſt have begun by a civil action. When *Eyanſon* was adviſed to quit having any concerns with them, and had left them, to avoid this buſineſs, being told it was a felonious affair, *Curril* ſaid, "If I had known the matter, I would have done for "him." *It is not neceſſary to prove an actual conſpiracy, nor expreſſed malice; a conſpiracy and malice is to be inferred from the circumſtances taken together.*

Ex facto oritur jus.

The ſeizure without authority; the many other circumſtances I have urged already: Does this look like the behaviour of a man acting innocently, and not with a deſign of conſpiracy? *If we were to grant a new trial, we ſhould be thought, either to ſuppoſe the evidence not proper to have been laid before the jury, or that the conſequence they drew did not follow properly from the premiſes; neither of which is my opinion.*

The Judges *Aſton* and *Aſhurſt* were of the ſame opinion.

Mr. Juſtice *Willes* was not on the bench.

Curril defended himſelf on his belief that there was a juſt ground; and did not enter, I think, into any other material circumſtance of defence.

Lord *Mansfield* deſired to ſee the warrant.

The information of *Catharine Honeywood* before Sir *John Fielding* was read.

The ſubſtance of it ſeemed to be this: That ſhe was chairwoman to *Catharine Butler*; *that ſhe ſaw Mr.* Farral *write ſeveral times over the name of* Catharine Butler *the teſtatrix*; that ſhe threw the pieces of paper he had ſo written into the fire. That he ſhewed a paper to one *Turberville*, which he had ſo written, and aſked him whether it would do? *Turberville* aſſented, and produced a paper, importing to be the Will of *Catharine Butler*, and *Farral* ſigned it *Catharine Butler*. There was a poſitive charge of forgery; and this *Turberville* was never wrote to to prove or diſprove the aſſertion. It is ſaid he is mad.

As Mr. *Curril* was entring largely into his defence,

Lord *Mansfield*—Mr. *Curril*, I ſhould be very glad to hear what you or any in your behalf have to offer; but this was not before me on the trial; and therefore I cannot hear it.

Curril ſaid, he was going to have ſpoken to it on the trial, but Mr. *Wallace* would not let him.

Lord *Mansfield*—Very properly: For you would not have given evidence to the jury in your own cauſe; nor to me in their hearing.

If you have any affidavit to your inſufficiency or character, we ſhall be very glad to hear it.

Affidavit of the poorneſs of his circumſtances, and that he was not worth 50 *s*.

JUDGMENT—*Fine* 1 s. *Impriſonment for ſix calendar months.*

Attachment.

Attachment.

MOTION for an attachment for not obeying a rule of court. Not granted; but inſtead of it, a rule to go before e maſter; otherwiſe an attachment, *niſi cauſa*.

Practice.

YOU can't have regularly a rule for an attachment againſt the ſheriff for not bringing in the body, till you have ex- pted againſt the bail.

Rule of practice.

Trial at Bar.

HIS lordſhip would not conſent to one without production of all deeds and evidence in writing which each ſide intend- d to make uſe of on the trial. And ſaid, *the counſel ſhould never onſent to a trial at bar without thoſe terms.*

Terms of trial at bar vide 3 Blackſtone, ch. 23.

The terms agreed on in the uſual manner, and the judgment to be inal and concluſive by conſent. This Lord *Manſfield* obſerved, vas no more than might have been compelled in a court of Chan- ry, but with great expence.

One ſide relying on a particular regiſter, and ſaying it would decide the cauſe; and the party on the other ſide ſaying he ſhould be very ſorry to have it tried without; and a third perſon being in poſſeſſion, and refuſing to permit inſpection of it; the court at firſt declined granting the rule; but preſently Lord *Manſfield*, and the reſt of the court, granted a rule for a trial on the firſt *Saturday* on next term. But Lord *Manſfield* obſerved, that this part of the rule would not bind them, unleſs inſpection was granted; and deſired them to intimate to the party in poſſeſſion, that the court would compel him if he ſhould refuſe to produce the regiſter; it being public evidence.

Lord *Manſfield* had obſerved, that though the general rule was not to grant the trial at bar on an iſſuable term, yet it had been granted, and would be done on proper occaſions.

New Trial.

Time for new trial on new diſcovery.

NEVER too late to move for a new diſcovery; which will take it out of the general rule of fo days, if you apply in due time after the diſcovery made.

Groſvenor *againſt* Gape.

IN this matter, a rule of the court of Common Pleas having been attempted to be evaded, the court of King's Bench here very much diſcouraged the motion.

The court of Common Pleas had granted coſts againſt the plaintiff in this court; upon which the defendant here in the King's Bench moved for a rule to ſhew cauſe why proceedings ſhould not be ſtaid till payment of coſts in a former action? The plaintiff in the new action came before this court to ſhew cauſe againſt the rule, on ſuggeſtion of mal-practices by ſuppreſſion of evidence. Many objections were thought by the court to lay againſt the application. They *thought that every court ſhould have ſuch a regard to it's own proceedings, as not to ſuffer them to be eluded by an application to another.* That the Common Pleas ſhould have been applied to; that the Plaintiff muſt find Security to pay coſts, as the court ſhould ſee fit on hearing, or elſe that he muſt apply for his remedy in the Common Pleas.

The plaintiff had grounded his defence in the Common Pleas on an action in this court.

Morgan *againſt* Jones.

THIS cauſe came on before the King's Bench, *Hilary* term 1773, for the opinion of the court, to be returned on their certificate into Chancery, and was thus:

Sir *Thomas Morgan*, previous to his marriage, was ſeiſed of various eſtates; particularly in the counties of *Monmouth* and *Glamorgan*; partly in *Borough-Engliſh*, partly in *Gavelkind*: And makes a ſettlement, in conſideration of marriage with Lady *Rachael Cavendiſh*, to himſelf for life; remainder to truſtees to preſerve contingent remainders; remainder to his heirs-male by Lady *Rachael*; reverſion to himſelf in fee. This ſettlement was made in 1723, and contains proviſions for portions for younger children. And he covenants to convey two ſmall copyhold eſtates and alſo a freehold. He purchaſed ſeveral freehold and copyhold eſtates af-r the marriage, and in 1725 mortgaged his freehold and another art of his eſtate to Mr. *Paget* for 1100 *l.* the 3d of *April* 731, having iſſue four children; *William*, born in 172; *Edward*, *Rachael*, and *Elizabeth*, [the defendant, now Mrs. *Jones*, hen about two years old] he makes his will; (his lady being, tis ſtated, ſuppoſed then pregnant) and firſt, he gives his jewels to Lady *Rachael* for life, and after her death to his ſon *William*, and f he dies without iſſue, limitation to *Edward* abſolutely. The houſe in *Tredigan* to his ſon *William* and his heirs for ever; the furniture to *William* for life, with like limitation over to *Edward*, on failure of iſſue of *William*, as of the jewels. The reſt of his perſonalty he directs to be applied by the truſtees of the ſettlement for payment of debts and legacies.

He directs his youngeſt ſon *Edward*, by name, to ſurrender certain lands held in *Borough-Engliſh* to the uſe and behoof of the eldeſt, his heirs and aſſigns for ever. Then he limits the eſtates in *Brecon* in manner following: To *Edward* the cuſtomary lands, which were moſtly gavelkind, for life, with truſtees to preſerve contingent remainders; remainder to the firſt and every other ſon in tail-mail; and for default of ſuch iſſue, remainder to the eldeſt ſon for life, with like remainder over; and for want of ſuch iſſue, to ſuch ſon as ſhall be born to the teſtator after his deceaſe, (limitation of the *Monmouth* and *Glamorganſhire* eſtates in like manner as of the former, to the two ſons, only the elder preferred) and in caſe, and if it ſhall ſo happen, that his ſaid ſons *William* and *Edward*, and any after born *ſon* ſhall die without iſſue male of their bodies as aforeſaid, then and in ſuch caſe he deviſes, for want of ſuch iſſue of his ſons then living, and of any ſon or ſons lawfully begotten, and hereafter to be born, all the reſt and reſidue of his real and perſonal eſtate not before diſpoſed of, to his brother *T. Morgan* for life, with truſtees to preſerve contingent remainders; remainder to *Thomas* the younger for life, with like truſts to preſerve contingent remainders; remainder to the heirs-male of his body; and for default of ſuch iſſue, remainder for life to *Charles*, the ſecond ſon of his brother, with remainder to truſtees as before; remainder to his heirs-male; *remainder* to the right heirs of Sir *William* himſelf in fee. Here too in the limitations of the *Monmouthſhire* and *Glamorganſhire* eſtates, as to the cuſtomary lands, the younger is preferred as to the elder.

He appoints Lady *Rachael*, her brother the Duke of *Devonſhire*, and his own brother, guardians of the children, in caſe they ſhould be under age at his deceaſe.

There is a power given to his eldeſt ſon, and ſo to his youngeſt, when they come into poſſeſſion reſpectively, of making leaſes, raiſing portions and jointures; the ſame power is alſo given to hi brother *Thomas* and his heirs-male, when they come into poſſeſſio reſpectively.

The words relating to the after-born iſſue are interlined in both places where they occur, and not taken notice of in the atteſta-tion.

The queſtion ſent out of Chancery was, *Whether* Thomas Morgan *the brother*, Thomas Morgan *the younger*, *and* Charles Morgan, *or any of them, took any, and what eſtate, in the counties of* Monmouth *and* Glamorgan, *by the reſiduary clauſe in the ſaid will?*

All the iſſue living at the making of the will are ſince dead, except the youngeſt, Mrs. *Jones*, and without iſſue; nor was there any ſon after born.

The caſe was argued firſt in *Hilary* term, 4th of *February*, 1773.

Mr. *Kenyon* ſtated the caſe as above—and then proceeded. I am to contend, that *Thomas Morgan* took an eſtate for life; his ſon an eſtate for life; and the ſons of that ſon an eſtate in tail-male. We are to conſider, whether the will is to operate at all? If it is, the queſtion is anſwered. I am going to conſider the deviſe as an apparent deviſe of the reverſion in fee, expectant on the failure of the eſtates-tail under the marriage-ſettlement. I preſume it will be ſaid, that the reverſion paſſes by way of executory deviſe, after failure of iſſue male generally. Whether there is a competent party to take; whether a competent inſtrument to paſs, and in a competent time, will be, I ſuppoſe, queſtioned. If it ſhould be ſaid the limitation could only take place as an executory deviſe, 1 Ld. *Raymond* 523. my Lord *Holt* ſays, a man ſeiſed of a reverſion after failure of an eſtate-tail, grants it after ſuch failure, this is no executory deviſe; but *from* and *after* only marks when the reverſion ſhould veſt in poſſeſſion.

He left his wife guardian, ſuppoſing ſhe ſhould certainly ſurvive him.

If it ſhould be thought children by another wife would have made an alteration, that event has not happened. If it had, the caſe of *Chriſtopher* and *Chriſtopher* might have made it doubtful.

Skinner—The words are to be governed by the intention of the party, whether there be legal words or no. It would be contrary to the intent, and pernicious, if more remote relations ſhould be preferred. Now in our caſe he gives to his ſons already born, his ſons hereafter to be born, and for failure of ſuch iſſue to Sir *Thomas Morgan* his brother, and his heirs-male ſucceſſively. And if this is be ſo conſtrued as to let in a ſuppoſed limitation extending to eirs of a future marriage, and this be interpreted to exclude Sir *homas*, then thoſe who are no where expreſsly named, or neceſrily underſtood, thoſe whom it was not probable he ſhould have r expect, and who, in fact, never came into the actual poſſibility f exiſtence, would be made to bar the eſtate expreſsly limited over o the teſtator's brother, contrary to the plain intent, and almoſt very object of the will would be defeated.

If it cannot take place as a deviſe of the reverſion, or a contin-ent remainder, I hope it may take effect as an executory deviſe.

If it is after failure of general iſſue, it is too late as a remainder; ut he gives over his jewels, in caſe Sir *William* ſhould die without ſſue at his death, then it may be underſtood ſo of the others, and o not too remote. *

Lord *Mansfield*—I take the two grounds to be; firſt, That this s a will referring to the marriage-ſettlement; and ſo refers to the ſons under the marriage-ſettlement: Secondly, That if it was with reſpect to ſons by another marriage, it would create eſtates-tail by mplication.

To this Mr. *Kenyon* agreed, and Serjeant *Hill* was preparing to eply, but Lord *Mansfield* being to go into the Houſe of Lords, the rgument was adjourned.

Feb. 8. Serjeant *Hill* for defendant—I am to ſupport before your Lordſhip the claim of Mrs. *Jones*, as the only ſurviving iſſue of the teſtator, and heir at law. The queſtion is, Whether by the reſiduary clauſe, *Thomas Morgan*, or his two ſons, *Thomas* and *Charles*, took any and what eſtate in the counties of *Monmouth* and *Glamorgan*? I humbly ſubmit the deviſe intended by the teſtator cannot by the intendment and words of the will; cannot by the rules of law, by the caſes adjudged, be conſidered other than an executory deviſe. If that be admitted, his intent was contrary to the rules of law, and therefore is as no intent. † He knew that he had two ſons and two daughters at the time of making the deviſe; he knew there might be a default of that iſſue, and of the iſſue of any other marriage; in caſe of ſuch default, uncertain in time, uncertain whether it ſhould ever happen, he deviſes over—the very words are as ſtrong as poſſible.

[* I don't find this caſe but in *Forth* and *Chapman* before Lord Chancellor *Parker*, the court went very far in order to reſtrain the words to *iſſue living at the death*; but ſtill in ſuch a manner as to diſtinguiſh remarkably between a term and freehold; conſtruing the ſame deviſe as to the freehold to be on failure of iſſue generally at any time, as to the term on failure at the death: And thus *ut res magis valeat*. So that any thing then ſeemed to be thought eaſier than to adapt the ſame conſtruction to real eſtates.]

† Omne legibus vetitum impoſſibile.

"Foraſmuch as it is my intent and meaning, in caſe my ſons
" or any other ſon of mine hereafter to be born, ſhould die with-
" out iſſue male of them, or any one of them; then follows (he
" repeats the words again) and in caſe, and if it ſhould ſo happen,
" and for want of ſuch iſſue of my ſaid ſons *William* and *Edward*,
" and of any other ſon or ſons of mine lawfully begotten, he de-
" viſes over—(then and in ſuch caſe, and if it ſhall ſo happen)
" to his brother *Thomas Morgan* for life, with the ſeveral limita-
" tions over for life, and in tail to the iſſue of his brother."

This is of the ſecond ſort of executory deviſes, (where no preſent fee paſſes, nor any immediate freehold is limited) [as *Fearne* 64.]

There have been ſeveral ſorts propoſed of eſtates, which may be ſuppoſed intended. Mr. *Kenyon* has mentioned them; and it ſhall be my endeavour to ſhew none of them can take effect.

1ſt, The brother can't take by remainder. A remainder is defined by Lord *Coke* as a reſidue of a particular eſtate depending upon it, and created by the ſame inſtrument: Here the eſtate is created at different times, and by different inſtruments. *More* againſt *Parker*.

Bryan—I apprehend there is no difference between a ſpringing uſe and executory deviſe; but that one being created bydeed and the other by will, the latter ſhall be more favoured, if the intent appear and be conſonant to law.

I conceive, upon the caſes above cited, if the teſtator be only ſeiſed of a reverſion in fee, he can't by words ever ſo proper paſs a remainder or executory deviſe of it. He might have ſaid, *I deviſe the reverſion to my brother, and after to his ſons*; or deviſed the eſtates in his marriage-ſettlement *eo nomine*.

[Lord *Mansfield*—He has, I doubt, deviſed thus: "All my lands " in *Monmouth* and *Glamorgan*."] I apprehend there is no immediate deviſe; becauſe it is limited after the death of iſſue born, or hereafter to be born. There might have been a great chaſm between the particular eſtate and the gift out of the reverſion to his brother. Had he ſurvived Lady *Rachael*, and married again, would the deviſe then have been good? If it would have been bad, it is ſo: It was either bad or good originally: No ſubſequent event could make it good, if not ſo at firſt.*

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* Quod ab initio non valiut tractu temporis non convaleſcit.

The words *lawfully begotten*, and *hereafter to be born*, make no difference; any more than *procreatorum* and *procreandorum*; which laſt equally applies to ſons already begotten, as the firſt *procreatorum*, notwithſtanding the ſeeming difference in grammatical import; and ſo here lawfully begotten and hereafter to be born, is no more than if he ſaid ſimply hereafter to be born.

Burrows. Goodman and *Haſkins*, 873. Deviſe, reciting articles of marriage-ſettlement, to the heirs of her niece by a ſecond huſband lawfully to be begotten; and on default of ſuch iſſue, then over.

Queſtion, Whether limitation is good as eſtate-tail by implication? Whether as executory deviſe? Whether the deviſe, the event never happening to the iſſue by the ſecond huſband, ſhould be thrown out of the caſe? It was ſaid, that it might have been contingently too remote as an executory deviſe; and *if bad in original, never could be made good.*

[Lord *Mansfield—You need not cite caſes: 'Tis a principle.*]

Eſtate-tail by implication to the ſons of a ſecond wife is the ſecond mode, and is therefore inconſonant with the former, which ſuppoſes the iſſue to be intended of Lady *Rachael* only: Arguing on both infers that both are uncertain; and that uncertainty I apprehend is as ſtrong againſt a will as a deed.

But if I prove to your Lordſhip that he never intended to raiſe eſtates-tail by implication, they can never be created. Suppoſe a man has an only ſon, makes an eſtate in truſtees to the uſe of his ſon for life, without impeachment of waſte; then immediately on the death of his ſon, remainder to the heirs of his ſon in tail. If before the birth of a grandſon, the ſon by feoffment or any other way alien, your Lordſhip will not ſupport the eſtate-tail, why is this but becauſe the eſtate in truſtees cannot be raiſed by implication to preſerve contingent remainders.

What I mainly intend, my Lord, is, that the intention is contrary to law; there are many caſes adjudged, one of the higheſt authority, a determination in the Houſe of Lords, which is *Laneſborough* and *Fox*, determined in the Houſe of Lords in the time of Lord *Talbot*.

I ſhall come to that caſe preſently, but *Vaugh.* 259. I ſhall cite firſt, believing it's authority has never been ſo much as queſtioned. I ſhall take the very words of the will.—After truſts appointed for payment of debts out of a leaſehold eſtate, if other perſonalty not

ſufficient,

ſufficient, proviſion for raiſing portions for daughters; and after payment of debts and portions, the rents and profits of the ſame to his ſon.—"My will and meaning is, that if it happen that my ſon George, Mary and Katharine my daughters, ſhould die without iſſue of their bodies lawfully begotten, then all my freehold lands which I am now ſeiſed of ſhall come, remain and be to my nephew *William Roſe* and his heirs for ever."

Lord *Vaughan*—The law does not approve eſtates-tail by implication. Eſtates-tail by implication, which is only conſtructive, ſhall not be good to the diſinheriſon of the heir at law. It muſt be a neceſſary implication: I call that a deviſe by neceſſary implication, to *A.* when *A.* only can take.

If in that caſe the intention of raiſing eſtates-tail by implication was not neceſſary, and therefore not admitted, I apprehend the ſame reaſon will hold here with equal ſtrength.

4 *Mod.* 316. *Moor* and *Parker*. A caſe which has been mentioned to another purpoſe. *George Chute* the father being ſeiſed, made a ſettlement to *George* his ſon for life, remainder in tail-male, reverſion in fee to *George* the father. He made his will, providing, that if his ſon's wife die in the life of her huſband without iſſue male, then the ſon ſhall have power to make a jointure to any other wife: And for want of iſſue male by his ſaid ſon, then to his ſon by any other wife; 4000 *l.* to his grandaughter. And in caſe of failure of iſſue male by his ſon *George*, then all to his grandchildren and their heirs.

The queſtion is, Whether *George* had an eſtate-tail, ſhare and ſhare alike, or for life?

It would be impoſſible to create an eſtate-tail by tacking the words in the will to thoſe in the ſubſequent limitation; becauſe the ſettlement and will are two diſtinct conveyances.

Another caſe there is, a very ſtrong one, I apprehend.

3 *Mod.* 104. In ejectment, ſpecial verdict—Teſtator being ſeiſed in fee, had two ſons and four daughters, and makes his will, containing *inter alia* as follows: Item, "I give my eſtate to *Nicholas* my ſon, and if it pleaſes God to take my ſon, then to my daughters ſhare and ſhare alike: And if any of my daughters die without iſſue unmarried, then her ſhare to the ſurvivors: And if all my ſons and daughters die without iſſue, then over."

Here was an apparent eſtate for life (with a very ſtrong probability of intending to carry it further) and yet the court was of opinion no eſtate-tail in the daughters.

Laneſborough and *Fox*, I apprehend, is a caſe in point; both againſt reſtraining the words *hereafter to be born* to the children of Lady *bel,* and againſt raiſing eſtates tail by implication. Determined eight of the judges. Eſtates in truſt to preſerve contingent re- inders. *James Lane* was tenant for life; remainder to his heirs le, as purchaſors.

James Lane, the father, ſeiſed of the reverſion, makes his ll; a deviſe to *James*, and ſays, "If my ſon *James* die without iſſue," meaning plainly, to take in his daughters; remainder over. wat reſolved, *Frances*, the daughter of *James*, who died without ue male, ſhould not take.

It would not hold, in our caſe, that to raiſe eſtates-tail by impli- tion, nor by reſtraining iſſue, ſo as to ſignify iſſue male only: or here to reſtrain iſſue, ſo as to ſignify iſſue of the marriage only.

This muſt be the reaſon why Mr. *Kenyon* entered a proteſt againſt ting caſes, by ſaying, every will ſtood on it's own ground.

I muſt ſay, this is not only an eſtate which is not limited ſo as to ke place according to law: But that no lawyer in the houſe, with- ut altering the intent, could make the deviſe conſonant to law.

[Lord *Mansfield*—To be ſure, it is a very important caſe, though ery imperfectly reported in the printed caſes, which make an im- oſſibility, by making the ſenior judge ſpeak firſt.]

The caſe cited from my Lord *Raymond* is not his own report, Here was limitation in tail male to the ſons of *James*, the younger, as appears by expreſs limitation in the determination in the Houſe of Lords, though omitted in Lord *Raymond*.

Badger and *Lloyd*. *John Lloyd*, ſen. conveyed by leaſe and releaſe to the uſe of himſelf, for ninety-nine years, if he ſhould ſo long live; ſame remainder to *John*; remainder to *Elizabeth*, wife of *John*, for life; remainder to truſtees during the life of the two *Johns*, to preſerve contingent remainders; remainder to the iſſue of *John* the younger, in tail male; remainder to himſelf in tail male; reverſion in fee. He had four ſons, and by his will deviſes after the death of *John* the younger, to *Thomas*, the ſecond ſon, in tail male; remainder to *Paul*, the third; remainder, on his death without iſſue male, and none of the brothers living, to the fourth, in fee.

The reporter makes it ſaid, the will is revived, which is nonſenſe. It is better reported in *Salkeld*, though not exactly. If he had diſpoſed of the reverſion under the marriage ſettlement, it would come within our caſe.

[This was determined a veſted remainder in *Peter*, the fourth ſon, and the court ſaid, this was the caſe of a reverſion expectant on an eſtate tail, deviſed after death of tenant in tail, to another in tail: This not an executory but immediate deviſe; and from and after only declares when it ſhould veſt in poſſeſſion.]

Holmes and *Meynell.* There was an expreſs deviſe to the daughters, and the heirs of their bodies; remainders over. Here it was evident, that he meant remainder to the ſurvivor on the death of either. If there had been more than two, they would not have raiſed an eſtate tail by implication. If the queſtion had been, how the after-born ſons were to take, in our caſe, it might have applied.

The reaſon againſt raiſing eſtates tail by implication between more than two, is the uncertainty of the eſtate. This, then, applies rather more againſt Mr. *Kenyon*; for there might have been more than two after-born ſons, and the uncertainty of what eſtates, and in what manner they are to take, affects the queſtion as much on that ground as it does *Holmes* and *Meynell.*

Hob. 313. *B.* ſeiſed in fee, makes a conveyance to *A.* remainder to *B.* and *C.* ſucceſſive, without ſaying *ſicut nominati in charta. B.* and *C.* can't take immediately; they are not parties to the deed, and the remainder void for uncertainty. I ſuppoſe this affects the deviſee as well as the grantee. *The title of the heir at law is a certainty: It muſt be defeated by ſomething as ſtrong as itſelf.* If there be two wills, and priority or poſteriority is doubted, neither can take effect.

If deviſe to *John Smith*, Eſq; of the county of *Middleſex*; remainder to his two nephews, and there be two perſons anſwering the deſcription, the whole deviſe is void. *

If I remember, Mr. *Kenyon* ſays, he deviſes an eſtate tail to the ſons already born, in expreſs terms, excluſive of the after-born ſons.

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* I believe it will occur to every reader, that the deviſe is only void in ſuch caſe, if nothing can be found to explain it upon the will: In which courts will catch at the ſlighteſt circumſtance, to determine the perſon, rather than the will ſhould fail; nay, even parol evidence has been admitted, in favour of a will, upon ſuch a caſe, to explain the perſon intended: So that courts have, of late, at leaſt, and perhaps upon the general principle, and the directions of the ſtatute of wills, for the favourable conſtruction, rarely, if ever, been diſpoſed to let in the heir againſt the expreſs declaration of the teſtator, who appoints another, while there was any poſſibility of tracing out, by any means of receivable evidence, who that other was.

Therefore, there is no eſtate tail by implication to the after-born ns; and yet, by and by, he maintains an eſtate tail in thoſe after-orn ſons, by implication; and this, he ſays, is *noſcitur ex ſociis:* Whereas I think, it is rather *noſcitur ex diſſociis.*

I think, I have proved, that it can't operate as a remainder; nor ſ reſtrained to the ſons of Lady *Rachel*; nor as eſtates tail, by imlication, to the after-born ſons; nor as a diſpoſal of the reverſion uner the marriage ſettlement; therefore there remains only that it ſhould perate as an executory deviſe, which cannot be, I humbly ſubmit, onſiſtent with the rules of law, nor with that uniformity of decions neceſſary in judgments, and which, I am confident, your Lordip will always maintain here, as long (and very long may that be) ſ your Lordſhip ſhall preſide in this court.

Mr. *Kenyon*, in replication—I have looked into more reports than have cited, by ſome fifty: Many of thoſe cited on the other ſide, thought were to be paſſed over, as they did not ſeem to be to the oint. The learned Serjeant opened with a rule, which, I hope, ill decide the point, *That the teſtator's intent ought to take place, hen not contrary to law.* We differ only in our conceptions of it's greement or contrariety. In the caſe of *Robinſon* and *Robinſon*, the ourt determined a different eſtate to what the teſtator certainly neant: But the teſtator's primary intent was, that deviſee ſhould ke; and the court would fulfil that intention as far as by law they ould. It is not pretended here, that the heirs of Sir *Thomas Moran* are incapable of taking; how they ſhould take, the court will ee.

I did not quote *Holmes* and *Meynell* as a caſe in point, but for the ke of Lord Chief Juſtice *Pemberton*'s judgment in *Skinner*.

In the caſe in Lord *Vaughan*'s Reports, 259, the extent of the ropoſition there laid down has been much doubted. Lord Chief uſtice *Wilmot* ſaid, that he had often doubted the poſition there laid own, that an heir cannot be diſinherited but by neceſſary implicaion. That he could wiſh there had been added, *or plain intention.*

The caſe of *Laneſborough* and *Fox*, I underſtand, was an eſtate or ninety-nine years to *James Lane*, and after, an eſtate to the heirs f his body. The Lords were of opinion, that the eſtate of *James* ould not be enlarged by implication. I will venture to ſay, that it annot, being only a chattel intereſt, be enlarged, even by expreſs vords.

[Lord *Mansfield* ſaid, there was no queſtion there about the heirs f the body of *James*.]

I hope, either by excluſion of the after-born iſſue, or by raiſing eſtates to them by implication, the limitation over may ſtand to the heirs of *Thomas Morgan*.

Lord *Mansfield*—As at preſent adviſed, I cannot wiſh a farther argument, the ſubject has been ſo well argued on both ſides; and all that can be ſaid on it ſeems to be exhauſted: But if the parties deſire a farther argument, I ſhall certainly give it.

On motion made on behalf of Mrs. *Jones*, the defendant, it ſtood for farther argument.

12 *February*, 1773.

Whether the meaning reſtrains the words to the ſons of the firſt marriage.

Lord *Mansfield*—The only ground you went upon to ſupport it, as an executory deviſe, was a dying without iſſue, in the life of teſtator. This, I think, is not within the intent of the teſtator, and therefore, it did not ſtrike me. The words would carry to the iſſue of the ſecond marriage: If the meaning reſtrains them to the firſt, there will fall the queſtion.

Whether a double contingency.

But, ſuppoſe the meaning of the will don't confine the words to the firſt iſſue, then, whether there is not a double contingency. And though in the caſe of *the Duke of Norfolk*, ſuch double contingency was thought too remote, yet I need not quote *Saberton* and *Saberton*, and many other of the more modern caſes, where it has been held, that if the ſecond contingency never ariſes, (as in this caſe, if there were no after-born ſons) then the deviſe over is good, as within the time of law.

I ſpeak no opinion; but would hear every point argued.

Whether the after-born ſon does not take by expreſs deviſe.

Queſtion too, Whether here is not an expreſs deviſe to the after-born ſon? who has a power given him, whenever he ſhall be born, &c. to appoint jointure, and make leaſes, in the ſame manner as the other ſons.

The caſe came on again *Trinity* term, 4th of *May*.

Mr. *Dunning*—This caſe comes before the court from Chancery, for the opinion of the court—— I ſhall ſtate ſhortly.

Sir *William Morgan* makes a deed of ſettlement previous to his marriage: Eſtates tail are given, in the uſual manner, to his eldeſt and other ſons; then reverſion to himſelf in fee.

Then he makes a will after his marriage, and diſpoſes of ſome ſtates to his youngeſt ſon, *Edward Morgan*, and the heirs male of s body; then to the eldeſt ſon, in like manner; remainder to ſon be born after his deceaſe; deviſes over to his brother *T. Morgan*, r life; remainder to his heirs male; remainder to himſelf, in fee: hus of the eſtates purchaſed ſince the marriage. As to the eſtates hich he conſidered in himſelf, under the marriage ſettlement; he iſpoſes of his eſtates in *Monmouth* and *Glamorgan*, after failure of ue of his ſons already born, and of any other ſon lawfully begotten, and hereafter to be born, to his brother, *T. Morgan*, for life; ith remainder to the iſſue in tail male.

He made this will the 2d of *April*, 1701, and died the 24th, aving iſſue, *William* and *Edward Morgan*, and daughters, *Rachel* d *Elizabeth*. *William* died an infant, in 1740; *Edward* at the age twenty-one, in 1746; then *Rachel* died without iſſue, and *Eli-abeth* only ſurvived. At this time the queſtion in all wills, is the ear intention, which it's the duty and inclination of the courts to llow.

Sir *Charles Morgan*, nephew of the teſtator, was living at the me of the teſtator's deceaſe, and entered on the death of his faher and brother, and is in poſſeſſion. If the daughter take, it will contrary to the intention of the teſtator. If the words *after-born n* are conſidered as preferring ſuch iſſue to his brothers, they may underſtood ſons of Lady *Rachel*, under the marriage ſettlement.

That teſtator meant Sir Charles ſhould take before his daughter.

This will was made in the teſtator's laſt illneſs: I think, we may ſſert, he muſt have meant after-born ſons, or ſons of whom Lady *achel* might probably be enſient, and who might be born after his eceaſe. Beſides, in his will he makes Lady *Rachel* guardian of theſe ter-born children; which ſhe could be of no others but ſuch as ere to be born of her. If it ſhould be preſumed, the hardſhip ould have been great, if he had got over the then illneſs: Either that caſe he would have had an opportunity, and inclination, probably, on having children by a ſecond marriage, to have altered his ill, or, if he had not altered it, it is determined on the concurrent ſtimony of Sir *Eardley Wilmot*, Lord Chief Juſtice *De Grey*, and ord Chief Baron *Parker*, that a marriage and children was virtully a revocation of a precedent will.

That by after-born ſons, he muſt have meant of Lady Rachel.

But take his meaning as large as poſſible when he had no after-orn iſſue, the next remainder, in the intention of the teſtator and peration of law, takes immediate effect. If the court over-rules is ground, they will over-rule not only the authority, but, which more, the good ſenſe of many concurrent determinations. But is ſaid here is no abſolute deviſe; and eſtates-tail muſt be raiſed by

That the contingency of after-born children, whatever it meant, never happening, the next remainder took place immediately.

by expreſs words or neceſſary implication. What neceſſary implication means, but plain implication, I can't tell; and if it means any thing more, I apprehend it would not have been uſed at this day: No croſs-remainder would ever take effect by neceſſary implication. I underſtand the court dropt ſomething laſt Term about a contingency with a double aſpect, which is a quaint phraſe I do not perfectly underſtand—But if it means, as on truſt on one event, the entire eſtate-tail to one perſon; and if ſuch an event happens, then the entire to another perſon; I take this not to be ſuch a contingency: But this is ſo far a contingency with a double aſpect, as to have conſideration of the after-born ſons, and if none are born, then on that contingency, a diſpoſal looking immediately to the heirs of Sir *Thomas Morgan*.

What is meant by a contingency, with double aſpect.

Lord *Manſfield*—Are you not aware that a double contingency is, as in the Duke of *Norfolk*'s Caſe, where there were three or four ſuch contingencies.

[*Saberton* and *Saberton* there quoted; *Stanley* and *Leigh*. If a ſon is born, he takes the whole eſtate immediately; if no ſuch ſon is born, then the deviſe over is good. I don't conſider this as immediately affecting the caſe, but only *quacunque viâ datâ*, it was taken hold of to ſet the argument in all its lights.]

This is an eſtate of inheritance. I admit it would not be good as an executory deviſe; that there is no expreſs limitation I acknowledge: However, there is an implied one. Then as to the power of jointuring to the after-born ſons—

Lord *Manſfield*—This ſtruck me very much: But I take it 'tis only of the eſtates he was ſeiſed of in fee, not of thoſe in *Monmouth* and *Glamorganſhire*.

I underſtand that after the death of the elder brother, the younger ſon was to take all, and would be in poſſeſſion of the whole; and as to which eſtates are concerned, the proviſo ſays, "all the "eſtates of which he was or ſhould hereafter be in poſſeſſion;" and that the ſame power of leaſing and jointuring ſhould be on one, and not on the other, or in a different way, was unlikely: And this power is to ariſe on and not before their coming into poſſeſſion; ſo that though it could not take effect, perhaps, as to either of the ſons provided for under the marriage ſettlement, either as to the part into which the youngeſt was to come firſt into poſſeſſion, or that into which the eldeſt; yet as to the other after-born ſons, it might take effect; and then there is a deviſe by implication, or elſe the after-born ſons may be meant of the ſons of Lady *Rachell* only, and if that be the caſe, it makes for us. And laſtly, as I underſtand, the caſe ſe of *Laneſborough* and *Fox* is made of importance to the point: my learned friend ſhews in what they *agree*, I promiſe to ſhew what they *differ*.

For the defendant.

That it is an executory deviſe; too remote, and therefore void.

Mr. *Manſfield*—I contend, that neither the brother, nor the two ns of that brother, took any thing under the will, by the reſidu- y clauſe. I maintain it to be an executory deviſe after an indefi- te failure of iſſue; and therefore too remote. The intention of the ſtator will be ſupported, but not againſt the heir at law; except pon clear proofs. The intention of the teſtator alſo, however ear, cannot be complied with, if not conſonant to law The re- duary clauſe is, " As to all my eſtates not hitherto deviſed, I give and bequeath, in caſe my ſons, born and hereafter to be born, die without iſſue of their bodies, lawfully to be begotten; then, in ſuch caſe, and if it ſhall ſo happen, I give and bequeath to my brother, *&c*:"

He ſpeaks, as plainly as poſſible, of eſtates not hitherto deviſed: He gives expreſsly, after a general and indeterminate failure of iſſue. t will never be ſaid, that it Sir *William* had been adviſed by an able onveyancer, he would have made a deviſe conſonant to law, if he id not make ſuch an one, but one quite the contrary.

That for uncertainty what after born ſons means, the heir at law ſhall come in, if it be uncertain; but that it is general, and carried too far; and that eſtates-tail cannot be raiſed by implication, where no previous eſtate is given.

As to the meaning of the words, " after-born ſons," I don't ſee ny gentleman arguing this point, has ſpoken with certainty, which f the two meanings the teſtator had; whether a general failure of ſue, or of iſſue by Lady *Rachel*. Both cannot be maintained; and nd then, for the uncertainty, the heir at law will come in. But I pprehend, whatever he poſſibly might intend, he has made the eviſe ſo general, that it cannot be reſtrained to ſons of Lady *Rachel*. As to eſtates tail, to be raiſed by implication to all the after-born ons, I believe there never was ſuch a raiſing of an eſtate to perſons who had no previous eſtate given them. Where a man gives an ſtate to his ſon after his wife's death, an eſtate for life is indeed aiſed to the wife; but it is by an implication ſtrictly neceſſary But contend, no eſtate has ever been raiſed by any lower degree of mplication, without a precedent eſtate.

Uncertainty.

Gardiner and *Sheldon*. In the caſe before cited, *Holmes* and *Mey- ell*, the court take notice, that they can't give an eſtate to the ſons, becauſe they do not know how and in what order they are to take. Here Sir *William* has not given a hint, whether they ſhould take for life, remainder in tail; whether they ſhould take by croſs remain- ders between themſelves; whether ſucceſſive; or how.

Want of eſtate precedent.

Cummins. That no eſtate tail was raiſed by the words, " For want of iſſue male, or failure of iſſue male;" for want of a pre- ceding eſtate. I think the caſe of *Laneſborough* and *Fox* is very much to the point, where the queſtion was, whether *James Lan* took any greater or other eſtate than under the ſettlement. The objection was preciſely as in favour of Mrs. *Jones*: The court ſaid there was no neceſſary implication, and leſs was not ſufficient.

[Lord *Mansfield*—Had he not an eſtate for life?] Yes; but unde the ſettlement: And thoſe two eſtates could not be tacked togethe in two inſtruments. What Mr. *Kenyon* ſaid did not ſeem to the caſ that the eſtate of *Lane* being for years could not be enlarged. Th caſe of *Moor* and *Parker* is preciſely the ſame as that of *Laneſboroug* and *Fox*, (except the eſtate for life) which, for the reaſon before-mentioned, and in the arguments of the counſel, and in the opinion of the houſe, ſeems to have been thrown quite out of the queſtion. And then the deciſion was, that it can't take place as a eſtate by implication; and as an executory deviſe was too remote what is the natural conſtruction of the proviſo? Why, it was a to the eſtates he came by after the marriage by purchaſe, and wa ſeiſed in fee: And of ſuch eſtates for life are made, to all who are to take in them. But, as to the tenants in tail, they could even ſuffer a recovery, and bar the whole intereſt; much leſs do they want power to grant leaſes, and raiſe jointures. As to croſs remainders raiſed by implication, where is the precedent eſtate to raiſe them out of?

That no argument from analogy of the caſes of Saberton, &c.

As to the analogy from the caſes of *Saberton* and *Saberton*, *Stanley* and *Leigh*, I take it, there is no argument from them in ſupport of this deviſe; becauſe in all thoſe caſes, there is an expreſs deviſe to thoſe after whoſe death without iſſue male remainder over is limited.

[Lord *Mansfield*—As to this caſe, I would explain the double contingency more clearly than I had done. "If my ſons die without "iſſue, then I give over; if I have another ſon, and he die without "iſſue, then I give over alſo."]

As to the diſpoſal of them, the difficulty aroſe, that in caſe of real eſtate, an unborn perſon might bar the tail, when he came to the age of twenty-one; but in perſonal, it was thought that there was no bar, becauſe there could be no recovery: And thence, I take, the difficulty aroſe. But the birth immediately is a bar in that caſe, and the whole eſtate veſts. Mr. *Mansfield* concluded with obſerving, that as it could not be good, for the reaſons he ſtated, as an immediate deviſe of the reverſion, it could no way take effect, but as an executory deviſe, and as ſuch, void.

Mr. *Dunning*—I admitted, in ſetting out, that the intention of the teſtator, however plain, cannot take effect, unleſs conſonant to law. I admitted, that as an executory deviſe, it was not good; but it therefore contended, (without a ſhadow of ground, that I can nd) that Sir *William Morgan* meant an executory deviſe. Why hrow ſuch an aſperſion on the memory of my client's anceſtor, as o ſuppoſe he knew any thing about them, or their diſtinctions? or neant to make, or in fact did make one? The words, "then and if it ſhall ſo happen," are the only words on which it is taken that he neant a future and not a preſent intereſt. I thought I had already nſwered this, and that no doubt was entertained about them, and, think, the court ſtill entertains none.

It has been ſaid, from ſome notes in ſhort hand, which I do not xpect to hear generally in theſe caſes, that he can't mean after-born n both the ſenſes; and therefore, that he meant neither. He muſt ave meant one way or the other; and it is indifferent to me which e meant. As to what has been ſaid, that in croſs remainders there was a precedent eſtate always, the ground of all theſe determinations has been neceſſary implication; in other words, plain intention: If the intent is either way plain, I can't ſee the neceſſity of ſuch previous eſtate given by the will.

In the caſe Mr. *Manſfield* cited, where an eſtate for life paſſes by implication, there is no previous eſtate to the party; ſo that, I think, the caſe makes againſt the argument. As to *Gardiner* and *Sheldon*, the caſe was reſted on the ſuppoſed uncertainty, and on that point, I don't think it quite ſufficient.

The caſe of *Moor* and *Parker* was determined on the footing, that I can't tack two inſtruments together. So was the caſe of *Laneſborough* and *Fox* expreſsly, by what I have been able to ſee of the arguments and deciſion of the Houſe of Lords. And if I contended, that two inſtruments ſhould be tacked together, they would make againſt me, and I ſhould be arguing againſt deciſions. As to the point of jointuring, *&c.* my learned friend ſaid, it was of no uſe to thoſe who had an eſtate tail, but to thoſe who had an eſtate for life. Then it was applicable to nobody; for it is taken in the ſettlement always as connected with ſuch eſtates, to which Mr. *Manſfield* makes it uſeleſs. It is not, perhaps, uſeleſs to have the power of granting leaſes, raiſing jointures, *&c.*

Judgment of the Court.

Lord *Manſfield* delivered the opinion of the court in the following terms:

Caſe ſtated.

Sir *William*, at the time of making his will, was ſeiſed in fee of ſeveral eſtates in *Monmouth* and *Glamorgan*, and alſo of equities of redemption, and of eſtates in *Brecon*; and had great eſtates in *Monmouth*, under the ſettlement. Eſtate to himſelf for life; remainder to the iſſue of Lady *Rachel*, in tail male; reverſion to himſelf, in fee: With proviſions in truſt of the uſual contingencies of a ſon's being or not being. Having, therefore, this reverſion in fee, and ſeeing his eldeſt ſon greatly provided for by the marriage, he gives to his youngeſt ſon *Edward*, in ſtrict ſettlement; remainder to *William*; then to the after-born ſon, whom he makes alſo tenant for life; remainder to his brother *Morgan*. The next diſpoſition regards the queſtion.—For the ſake of the *bar* and *ſtudents*, I cite ſo much of the caſe. "Foraſmuch as it is my intent and meaning, that if "all my ſons, and ſuch hereafter to be born, and their iſſue male "of their bodies, lawfully to be begotten, as aforeſaid," (which has nothing to be referred to but the diſpoſal in fee precedent) "die "without iſſue male. In caſe and if it ſhall ſo happen, that my ſons "*William* and *Edward* die without iſſue, and any other after-born "*ſon* without iſſue, then I give the *remainder*, which is a word of "importance, and all reverſions, *&c.* which are words in courſe, "to my brother," in ſtrict ſettlement, as before to his ſons: And this he does with the ſame powers as under the marriage ſettlement: Remainder in tail male to his brother's ſons; reverſion to his own right heirs, in fee. The queſtion ariſes, whether the deviſe not too remote? Before I come to this, a queſtion ariſes, which is very material. Whether it is to be conſtrued, though there are no words to reſtrain it, that the limitation in queſtion extends to the ſons he might have *by any marriage*, or thoſe *by Lady* Rachel *only*?

Queſtion, Whether the after-born ſons, mean ſons by any marriage, or by Lady Rachel only?

There is a power given to his eldeſt ſons, ſo to his youngeſt, when they come reſpectively into poſſeſſion, to make leaſes; the ſame power is given to his brother *Thomas*, and his heirs male, when they come into poſſeſſion ſucceſſively.

Whether the limitation over void; if it be, defendant entitled.

Queſtion, Whether the limitation, as to all the lands under the ſettlement, is not void? If it is, the daughter is entitled, as the reverſion was in Sir *William* in fee.

It is contended, that by the after-born *ſons, is meant ſons of any ſucceeding marriage*; which, there being no previous limitation to the iſſue of ſuch ſucceeding marriage, then there is a limitation of a fee; but ſuch a fee which the law will not allow, but upon certain reſtrictions.

It has afterwards been contended upon another point.

What is neceſſary implication.

*Moſt of the diſputes in the world ariſe from words.** It is ſaid, a *neceſſary implication* muſt be; and *this neceſſary implication* muſt be an *impoſſibility to be otherwiſe*. There never was ſuch an one. A *neceſſary implication is ſuch as does not want a conjecture*, but, upon the whole, cannot be doubted of.

In the caſe of *Corrington* and *Hellier*, a man by his will, meaning to make a family ſettlement, and to prevent the remainder from being barred by the tenant, he having no freehold, made an eſtate for ninety-nine years, *if he ſhould ſo long live*: The drawer omitted the words, *if he ſhould ſo long live*. It was *not impoſſible* he ſhould give an eſtate for ninety-nine years; but Lord *Hardwicke*, on the general view of the caſe, thought the words were to be added, *to eſtabliſh the plain intent*. Serjeant *Hill*, in opening, ſaid, there was no doubt of the intention; but that it was not ſo expreſſed as to take effect by law. Mr. *Manſfield* pretty ſtrongly doubted the intention; and when intention is doubted by counſel, without argument, I own it goes a great way. Sir *William Morgan*, who had moſt amply provided for his daughters, being poſſeſſed of a very great eſtate, after default of heirs male of his body, under the ſettlement, gives to his brother, whether he thought of a ſecond marriage, or no: Neither he nor the drawer plainly, had thought of an executory deviſe. Now I think, therefore, this deviſe may be ſupported according to the intention of the teſtator, *two ways*: Firſt, if he had a view to a *ſecond* marriage; if that had taken effect, according to what has very juſtly been ſaid by Mr. *Dunning*, this *marriage with iſſue* would have been a *revocation* of the ſettlement and will; ſo that the brother would not have taken the reverſion till after a general failure of iſſue male: But taking it, as I verily believe to be meant, of Lady *Rachel only*. The teſtator was in his *laſt illneſs*; the will three weeks before *his death*; he makes Lady *Rachel guardian* and *executrix*. He diſpoſes of the remainder by theſe words expreſsly, *remainder*; not *remainders*, as conſidering what eſtate he had to give, and finding it was only what ſhould be *remaining* in him *after the failure of the eſtates particularly limited under the marriage ſettlement*; this which *remained* he gives, *under that deſcription, immediately* to his brother, with the ſeveral ſubſequent limitations over to the iſſue; reverſion to himſelf in fee ſtill reſerved. But taking the words *after-born ſons* in the *largeſt ſenſe*, what will be the conſequence? That the ſons *of any other marriage* ſhall take an *eſtate tail*.

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* Vide Eſſay on Human Underſtanding, c. 9, 10, 11.

In caſe I ſupply the words, "In caſe my ſons:" The ſons I have now, or any hereafter to be born ſon of *any other wife*, lawfully to be begotten, ſhall die without iſſue of their bodies, lawfully to be begotten, then remainder to Sir *Thomas Morgan*? What then? If Sir *Thomas Morgan* is not to take till after failure of the iſſue male; he not meaning to diſinherit any of his ſons; it then follows, that they take an eſtate tail. And the other ſons are an *example how* they are to take it; *ſcilicet*, *ſucceſſivé*.*

As to the power of jointuring, *&c.* which is properly given to tenants in tail, if it extend to *all the ſons*, as well on eſtates under the ſettlement as in fee, (and that part which impowers his brother, and the iſſue of his brother, when they ſhall come ſucceſſively into poſ-

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* Verba relata, &c.
Certum eſt quod certum reddi poteſt.

ſeſſion, can't properly, I think, extend to the ſettled eſtates) then is, as *clear and expreſs* as poſſible, an eſtate tail to the ſons born, an after to be born, in the ſtricteſt ſenſe; remainder in tail to his br ther; reverſion to himſelf, in fee. If we are to conſtrue this as a executory deviſe, we are deſired to *ſtrain a conſtruction, in order t ſet aſide the teſtator's whole will and intent, which ought not to be done.* We ſhall make our *certificate* according to our preſent opinion; an if we ſhould alter our opinion, we will have it argued again.

[It never, I believe, was farther agitated in the King's Bench. And the Lord Chief Juſtice made his decree according to the certificate; from which decree Mrs. *Jones* appealed to the Houſe o Lords, and the counſel began to be heard, *April* 22, 1774.

At the ſame time a croſs appeal was brought againſt the decree o the court of Chancery, concerning ſome copyhold lands under th ſame will; and both were proceeded upon together. The queſtion upon the copyholds was before the Lord Chancellor, at the fittings after *Trinity* term, 1773; but, as the queſtion which was before th King's Bench appears much the principal, it ſeems better to take together what relates to that, though, for convenience of the parties, both were argued together before the Houſe: And I ſhall have principally taken the argument in ſuch parts as were little or not al urged before the court of King's Bench; and which, though they did not ſeem immediately to affect the deciſion, appear to contain ſeveral uſeful points.

CERTIFICATE was returned *accordingly*, and the Lord CHANCELLOR made his DECREE purſuant to the CERTIFICATE: From which an APPEAL was had to the HOUSE of LORDS, and, by the *advice* of all the JUDGES, DECREE AFFIRMED.

The King *againſt* Newman, and others.

On the Game-Act.

ON an information for undue conviction on the ſtatute againſt keeping and uſing greyhounds.

Uſing a greyhound merely, in company with a qualified gentleman who keeps it, is not within the ſtatute.

Mr. *Newman*, it appears on the evidence, convicted two perſons who were themſelves unqualified, but who were out with a qualified perſon; which they pleaded in their defence, and that the dogs were not their own. He ſaid he knew it, and, turning to his brother juſtice, ſaid, "They are duly convicted," and obliged his brother juſtice to convict them. The information is againſt both juſtices.

In this caſe it was ſaid, on the part of the juſtice, that the conicted perſons not being qualified by their own evidence, and it not ppearing by any evidence expreſsly, that the perſon they were with as a qualified perſon, or that the dogs were, as they aſſerted, not heirs, but his, that the information might not be granted. It was rther ſaid, that it has never been adjudged, that unqualified perſons ut with qualified, were free from the penalty; nor that it ſignified hether the dogs belonged to the qualified men, or to the others: or the being out to *uſe* them, was ſufficient within the ſtatute; or t leaſt it had been much doubted—Serjeant *Burland*, for the defendants.

Lord *Mansfield*—Let the juſtice pay the whole coſts, and go before the Maſter.

Serjeant *Burland*—Does your Lordſhip think them *ſufficiently* ualified?

Lord *Mansfield*—*Yes*; and it's matter of tenderneſs to take it this ay. I know you to be very judicious, and thought you led to it. The defence you ſet up for the juſtice was *none*; if it had been ever hought of by them.

I remember the caſe at *Exeter* of the poacher; the greyhound aken in his poſſeſſion: Even a ſpecial jury had no doubt, but found for the defendant. *Keeping* and uſing are the words of the ſtatute. Shall not a gentleman take any body out with him, to beat the buſhes, and ſee a hare killed? It appeared too, on the evidence, that the ſummons was taken out on the *Sunday*, and that the parties aſked an hour's time to go for Mr. *Linch*, the gentleman they went out with, who, they ſay, is worth ſeveral hundreds *per annum*. It is not pretended on the other ſide, but they might have brought this witneſs in three or four hours at leaſt.

This, Lord *Mansfield* obſerves, with ſome of the above-mentioned, were very aggravating circumſtances. However, you know the ſtrength (he added) of your own caſe: Take it by way of information. Serjeant *Burland*, however, thought it adviſeable to deſire leave then to refer it to the Maſter, which was granted accordingly.

The King *againſt* Sir Joſeph Mawbey, and others.

ON the ſtatute of 11 *G.* 3. againſt diſtillation of wheat, two hundred quarters found preparing for that uſe, in the proportion of one-third wheat to two-thirds barley.

Barley mixed with forfeited wheat ſubject to be ſeized with it.

They

Setting up a mill to evade the act not ſufficient.

They took thirty quarters of the wheat the defendants prevente the conſtables from taking; and Sir *Joſeph Mawbey* makes the conſtable a promiſe in writing, to ſurrender the aforeſaid wheat, an deſires the conſtable to ſeal: Afterwards, they turned the conſtabl away, and altered the proportion to one-eighth of wheat to the barley. Thus they contrived to make an uncertainty in the quantit and quality of the commodity.

A ſervant of Sir *Joſeph* depoſes, as to the mixture in the proportion of one-third of wheat, and in the manner neceſſary for diſtilling. The ſeizure of the wheat by warrant, and the prevention and afterwards, the ſhooting the wheat and barley together, in ſom degree by himſelf; and believes, the other ſervants might ſhoot mor together, as they were ordered.

Coote Miller, one of the men who were commiſſioned to execut the warrant, depoſes to the tenor of the warrant, and names th perſons who were alſo to execute, and went together. Proportio one-third to two-thirds. Servants, with broomſticks, &c. prevented *Furneſs* and *Thomas Mawbey* had the warrant ſhewed them befor receipt of a note from Sir *Joſeph Mawbey*, which ſays, if law wil warrant them in what he underſtands they are about.

John Lumley—*Coote* deſired to ſee whether the wheat was in th ſame proportion as before. Sir *Joſeph Mawbey* lets him in, but won' ſuffer the quarters to be taken.

Rule to ſhew cauſe why judgment ſhould not go againſt Sir *Joſeph* and *Thomas Mawbey*.

Lord *Mansfield* made his report. Special verdict found, that *Mawbey* and his brother were traders in diſtillery; that they were no millers; that *Gough* had reaſon to ſuſpect, that there more than fiv quarters; that they found two hundred and fifty quarters, two-thir parts wheat, and one-third barley; that they found them ſo mixed, that it was utterly impoſſible to ſeparate them. That on going to a ſecond ſeizure, they found about an hundred and fifty quarters mixed, about one-third part wheat, and the reſt barley; that Sir *Joſeph Mawbey* and his brother violently reſiſted and obſtructed the ſeizure; and, on the whole, if the ſeizure was *lawful*, they find for the plaintiff; if *otherwiſe*, for the defendant; and ſubmitted to the opinion of the court.

11 *G.* 3. *c.* 1. prohibitory of exportation of wheat and wheat-flour, and the uſe of them in diſtillery, then if any diſtiller, &c. have more than five quarters of wheat or wheat-flour at one time, or any for his uſe, penalty enacted; then power on warrant from ju-

ſtices to conſtable, to enter and ſeize. There is an exception of inders of corn and millers. The queſtion aroſe on this, Whether e wheat ground, and flour ſo mixed with barley, was forfeited?

The old caſe was cited, if a man of his own act, mix hay with y hay, or money with my money, ſo that they cannot be ſepa- ated, nor the part of each aſcertained, the whole ſhall be mine.

Cro. *J. Warn* and *Eyres*. The queſtion was on an action of ſault and battery; the plaintiff violently threw ſome money into n heap of money of the defendant's. There it was ſaid and agreed, hat the plaintiff had no right to any part; that otherwiſe a man hould be made a treſpaſſer againſt his will.

On the other ſide, that by the 13 *G.* 3. (theſe are annual acts.) There is an authority to ſeize any mixture: So that the legiſlature hought with Sir *Joſeph*.

The principal thing which ſeemed obſervable in Lord *Manſfield*'s eport was, that the jury found him and his brothers *not* millers. t appearing ſtrongly on the evidence, that the mill was *not* worked, nor had tackle as of a grinding mill, within the ſtatute, but was as a colour for the keeping the wheat, and applied to the purpoſes of he diſtillery.

The wheat appeared in the evidence about two hundred quarters, the barley four hundred and fifty quarters.

Lord *Manſfield* obſerved, it was very laborious to ſeparate the wheat from the barley; and if the wheat had been mixed by their own fault, they could have recovered nothing.

The obſtruction on the evidence appeared not very violent, conſiſting in threatening tongues, without beating them.

Note, In the pleadings before, in reply to the obſervation of the act ſince his reſiſtance, providing for ſeizure of any mixture, it was ſaid, the act did thus *ex majore & abundanti cautela*. That in the caſe of embroidery, upon the act 22 *G.* 2. *c.* 36. with which, and the proviſions of this act, a compariſon had been made, there was a poſſibility of ſeparating.

Lord *Manſfield*—I had no doubt at the time, nor any now. But the defendant deſiring a ſpecial verdict, I thought it neceſſary, for the ſake of a more ſolemn argument, to grant him that. I won't enter into what has been ſaid by myſelf on the trial, being merely willing to hear the opinion of my brothers. There has been no-

Verba ex abundanti cautela ſuper-addita interpretationi non officiunt.

thing new, but ſaying, the act of the preſent King is expoſitory of the former.

But it has been made ſince this queſtion, to ſhew the ſentiments of the legiſlature, in caſe any queſtion ſhould ariſe in future. As to the caſes in which the law, in other inſtances, has given a power of ſeizing forfeitures, though mixed, it has been done in things joined at the time appointed for the ſeizure, but ſeparable in their own nature.

In caſes of ſeizing of veſſels, if the legiſlature means to ſay the ſhip, they will ſay ſo in expreſs words. As to embroidery, it might have been ſeparated from the cloaths. A doubt might, without this, be conceived, whether if embroidery only had been mentioned, any thing elſe could be ſeized? There is an exception of the millers.

Nemo lucrabitur de injuria ſua propria.

Lord *Manſfield* obſerved farther, the ſeizure in a mill made no difference here, the parties did not come within the preſumption. It is a temporary act, one of thoſe ſeldom made to continue longer than a year, and, I believe, generally with a power reſerved of being diſcontinued ſooner, on ceaſing of the occaſion. It is made for the public benefit, on great exigences. Whether Sir *Joſeph Mawbey* mixed the grain, or bought it mixed, he is a treſpaſſer againſt the law, and ſhall not avail himſelf of his own wrong. Therefore, I continue of opinion, the obſtruction to the ſeizure, made by Sir *Joſeph* and his brother, was not juſtifiable. Were it otherwiſe, the act of the 11th of the preſent reign deſtroyed itſelf. There ſeems to me no doubt on the point; and the only queſtion can be on the value, which was determined by the verdict, and was always in the ſame proportion.

The Judges *Aſton* and *Aſhhurſt* delivered their opinions on the circumſtances principally with Lord *Manſfield*; only the former obſerved, that the act had no occaſion to ſay, whereas a diſpute has ariſen, *&c.* and that on an action on the ſtatute there could be no doubt about the number of the quarters, nor of 5 *l.* penalty for every quarter. The latter ſaid, the caſe in *Popham*, of hay mixed, was to the point. That he could not agree with Mr. *Lee*, that his client did not know the law; but he did not mean to obſerve, but evade it: And concluded with a wiſh, that all who were in the ſame intention might find the ſame fate.*

Proſecutor being ſatisfied, COURT ſet a FINE of 6 *s.* 8 *d.* They agreed to take the ſum of 500 *l.* which was conſiderably leſs than ſettled by the verdict.

Dolus & fraus legibus inviſa.

* Ὡς πασχοιτο και ἄλλος ὁτις τοιαυτα γε ῥεζοι.

Eaſter Term,

13 Geo. 3. 1773. K. B.

Eldridge.

BOND entered into by two obligors jointly and ſeverally. The nominal obligor offered evidence to prove the conſideration illegal: The Judge, before whom the cauſe was tried, excepted to the admiſſibility of the witneſs.

On this, a new trial was moved; and, in the argument for the new trial, *Tomkins* and *Barnet*, 5 *W.* & *M.* was cited. Action on a bond entered into by three on an uſurious contract. Uſury was ſet up as a defence againſt the bond; and one of the obligees was admitted in evidence. There was alſo cited the caſe of *Goſling* and *The Eaſt India Company*.

Lord *Mansfield*, on this motion of Mr. *Buller*, mentioned a caſe at *Guildhall*. Two defendants in an action; queſtion on admiſſibility; they were charged as partners. Said Lord *Mansfield*—I believe I admitted each as evidence againſt the other.

A council mentioned the name of the caſe, which he ſaid was *Backhouſe* and *French*, and that Mr. *Dunning* was council in it; but his lordſhip ſaid he was not quite clear, what his opinion was upon that caſe; or, at leaſt, that the reaſons upon which he grounded his judgment had ſlipt his memory.

Conviction.

ON a conviction on the ſtatute againſt hawkers and higlers, the juſtice ſtates that *A.* being one credible witneſs, ſwore

Of licence and duty to be paid by hawkers and higlers, vide 8 & 9 W. 3. c. 25. 9 & 10 W. 3. c. 27. 3 Ann. c. 4. 7 Ann. c. 7. 1 G. 1. c. 12. Of the penalty of forging a licence, vide 9 & 10 W. 3. c. 27. ſ. 5. Of not having a licence ready, or lending, vide 3 & 4 Ann. c. 4. ſ. 4. Of hawkers of unſtamped newſpapers, vide 16 G. 2. c. 26. ſ. 5. Vide Burn, title hawkers.

that *B.* the perſon convicted, travelled from town to town as a higler. The affidavit of *A.* afterwards ſtated in the conviction, i that the ſaid *B.* ſold him four yards of ribbon.

Conviction bad—becauſe the matter that ſupports it is falſified b the affidavit.

Information.

Information, not proper to try a civil right.

THE court will not grant an information to try a civil queſtion; except where the parties ſtand out againſt a trial a law.

This was on a complaint againſt commiſſioners, by act of parliament for lighting and paving, for not ſuffering their houſes, &c to be rated; to which they defended—that ſuch houſes were no within the diſtrict.

The court were of opinion, this was a ſubject more proper fo an appeal, than an information.

Appeal.

Appeal from quarter ſeſſions final, and what relief may be had, and how.

WHERE a power of appeal to the quarter-ſeſſions is give by Parliament, and that to be final; no other mode o trial can be admitted than that preſcribed by the act; but on refuſal to admit the appeal, duly offered, or want of due publication purſuant to the act, the court will give the neceſſary relief.

Motion adjourned, till the party who moved has an opportunit to appeal againſt the next rate to be made; for that by this means either the queſtion would be dropt, or the rate tried; and eithe way thoſe who moved for the information would have the obje for which they moved.

Informality.

Stile of the court of King's Bench miſtaken for that of the Common Pleas, vitiates the judgment.

MOTION againſt an execution levied on judgment of th court, on account of informality. The writ ſtates th plaint before our Juſtices at *Weſtminſter*, which is the ſtile of th Common Pleas—whereas it ought to have been "before Our "ſelves at *Weſtminſter*, or whereſoever we ſhall be in *England*."

Rule granted to ſet aſide judgment and execution.

Retur

Return to *Mandamus*.

MOTION for an information againſt the mayor and burgeſſes of *Nottingham*, for a falſe return to a writ of *Mandaus.* The writ recites, "Whereas it has been ſhewn, and that there have uſed, and ought to be, ſix junior counſel choſen; therefore *mandamus*, &c. to aſſemble and chooſe accordingly."

They return to the *mandamus*, that there ought not to be ſix juior counſel choſen as above, at the time of the writ iſſued, nor efore.

Evidence of election from 1712 to 1722, in the manner required y the *mandamus*.

Objection to the information, that there was no appearance upon he charter of ſuch mode of election, which ought to be ſtronger vidence againſt the uſage; eſpecially when for fifty years there had onfeſſedly been none ſuch, than any they could offer, to induce he court to grant an information.

On the other ſide—that there was ſufficient ground for an information; and that this was the only way of bringing it before a ury: And that if the right had once veſted, *ceſſavit* could be no ar againſt it. That at leaſt they ſhould have made ſuch a denial, s to alledge that the records contradicted ſuch right; otherwiſe, hat it ſhould be taken at preſent that they ſupported it.

Motion ordered to be adjourned, to ſee whether the parties would bring it on without information, granted. —— *

Davis *againſt* Morriſon.

Action of Trover.

ONE *Deeds* bought plate of the defendant, and gave him a draft on a banker. The defendant *Morriſon* gave a receipt on this draft as for caſh. *Deeds* pawned the plate to the plaintiff,

Pawnbroker, not knowing goods to have been unlawfully obtained by deceit, not liable to anſwer. Of brokers, that they ſhall be ſworn, vide 13 E. 1. ſt. 5. in Ruffhead s Appendix. Sale to a pawnbroker not to alter the property in London, vide 1 J. 1. c. 21. their fees, 21 J. 1. c. 17. ſ. 3. 12 Ann. ſt. 2. c. 16. ſ. 2, Not to buy and ſell bullion, 6 & 7 W. 3. c. 17. ſ. 7. Stockbrokers, 8 & 9 W. 3 c. 20 ſ. 60. Not to extend to carrying on any home or foreign trade or partnerſhip, except as to inſurance, vide 6 G. 1. c. 18. ſ. 25. Exception in favour of the South Sea Company, 6 G. 1. c. 18 ſ. 24. 27. Eaſt India Company, 6 G. 1. c 18. ſ. 28. Reſtraints and penalties on ſtock jobbing, 7 G. 2. c. 8. To enter all their contracts, 7 G. 2. c. 8. ſ. 9. Penalty on retailers of ſpirits taking pledges, 24 G. 2. c. 40. ſ. 12. vide alſo 30 G. 2. 24. 32 G. 2. c. 24. ſ. 2.

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* Quilibet præſumitur optime pro ſua cauſa dicere
Stabitur præſumptioni donec probetur in contrarium.

a pawnbroker, ſhewing him this receipt given by the defendant, as evidence of his property; on which *Davis* took the goods in pawn. The draft was a bad one; for *Deeds* had no money with the banker on whom he drew. *Deeds* was tried on an indictment on the 30 *G.* 2. preferred by *Morriſon*, for procuring, under falſe pretences—*Davis* produced the goods on the trial, to convict *Deeds*—*Morriſon* ſeized and kept the goods. *Davis* on this brought an action of *trover*. The jury at *Guildhall* found a ſpecial verdict, ſubject to the opinion of the court.

Mr. *Bearcroft*—The ſtatute of *James* has a very long preamble complaining againſt a new ſet of brokers.

Then ſ 4. recites, that no kind of goods that are ſtolen, or robbed, or *badly* or unlawfully purloined or *come by*, but theſe take them in pawn; therefore, for the avoiding of the ſaid miſchiefs and inconveniencies, thefts, robberies, felonies and *bad* people; then it proceeds to enact, that no property ſhall be changed in goods wrongfully or unjuſtly purloined, taken, robbed or ſtolen.

It is obſervable, that acts of parliament, in deſcribing felonies generally, uſe the word *feloniouſly*, as in an indictment; now here, though they deſcribe a felony, they purpoſely avoid the word *feloniouſly*; diſtinguiſhing, I think, clear between *unlawfully come by*, or *purloined*, in a manner not ſubject to an indictment; and ſuch as are feloniouſly come by. The *ſtat.* 34 *G.* 2. ſays, to be ſure only of goods, when the pawnbroker *knows them* to have been fraudulently obtained: But, I think, that by the *Statute of James*, whether the pawnbroker *knows* the fraud or *not*, no property veſts.—And I think it is of great conſequence to the public, to have the ſtatute ſo conſtrued. Mr. *Bearcroft* particularly urged, that *Davis* had never any property in the plate; it having come to his hands againſt the right of the owner, in whom he contended the property always remained; and, therefore, that an action of *trover* was not maintainable. And he cited 6 *Mod.* 114. that goods obtained by fraud were *no* property. [But *note*, this was as between the parties, and not as a third perſon.]

It was contended for the pawnbroker, that it was neceſſary by the *ſtatute of James*, that the taking ſhould be feloniouſly, *vi & armis*; that Mr. *Morriſon* gave credit here to *Deeds* on the draft, as for caſh. He did not queſtion whether he had caſh at the banker's; but gives credit to the draft as caſh: Therefore, the defendant *Morriſon* having endorſed the bill of parcels, acknowledging the receipt, accepting the draft as caſh, is not at liberty to take advantage. Mr. *Davis* accepted the draft on Mr. *Morriſon*'s credit as payment. Mr. *Morriſon* has no right to ſay *Deeds* came fraudulently to the goods by falſe pretences, and, therefore, no property veſted. *Davis* contributed to convict *Deeds*, and this ought ot to be turned by the defendant to his prejudice.

Lord *Mansfield*—The caſe is admitted by Mr. *Bearcroft*, that it ould be exceeding hard: If the *law*, however, will have it ſo, here is *no* remedy. But, I think, this caſe is *not* within the *ſta-ute of James*, which makes the property not veſt againſt the ight owner, as between *him* and the *taker*.

Here *Morriſon* acquires to himſelf property, without the concur-ence of the owner; he gives credit to a cheat: Who is to ſuffer? He, or a third innocent perſon?

Mr. Juſtice *Aſton*—I think the ſtatute is to be underſtood of a raudulent, tortious, or ſurreptitious taking, without the concur-ence of the owner. If the word *obtained* had been in the ſtatute, ſhould have thought it clearer: But, as the evil is greatly en-reaſed ſince the *ſtatute of James*, I could *wiſh* the pawnbrokers took t their peril.

Mr. Juſtice *Aſhurſt* much to the ſame effect as to the conſtruc-ion of the *ſtatute of James*.

Bail.

A Perſon offered as bail, was deſcribed in the notice as an hatter; on exception taken to the notice, he appeared to be a ſervant to an hatter, hired for a year. He lived in a ſeparate houſe —the court rejected him.

Bail deſcribed as hatter, being ſervant to an hatter, rejected.

Notice of Bail, with the Sur-Name omitted.

THE court gave them leave to take two days time to juſtify.

Sur-name of bail omitted; time to juſtify.

Zoffani *againſt* Jennings.

ON a rule to ſhew cauſe, why, on payment of coſts to the maſter, the trial of the cauſe between the parties ſhould not be put off till next term.

Affidavit on which the rule was moved, was, that Major *Bruce* is a material evidence to the defendant; and that he is major of ſuch a regiment, which regiment is now at the *Grenades*.

Affidavit that major Bruce is a material evidence, and that he is major of ſuch a regiment, and that the regiment is at the Grenades, held not ſufficient to put off the trial; but it might have done if the cauſe had appeared to have merits.

Objected—that the major himſelf is not ſaid to be at the *Grenades*, but only his regiment.

Lord *Mansfield*—There is certainly a flaw in this affidavit, if he does not ſwear that Major *Bruce*, but his regiment, is at the *Grenades*. I would not have gone upon this *wholly*, if there had been merits.

Discharge the rule.

Harrington *againſt* Jennings.

COMPLAINT againſt an attorney for not acting according to his duty as ſuch, in forwarding the plaintiff's buſineſs; and, that he did not proceed againſt the original debtor, but admitted of one Mr. *Hughes* undertaking, *per quod amiſit*, her debt.

It was a debt on a reſpondential bond.

It was ſaid, that the attorney had favoured the original debtor unduly.

Beſides, that he was not at liberty to act out of the general courſe, and contrary to the authority given; and then to ſay he had done for the beſt.

That he does not ſay he explained the nature of the proceedings to his client; or gave her to underſtand ſhe was made to give up the benefit againſt the original debtor, and rely on the other ſingly.

That it is true, ſhe conſented in general terms, not underſtanding the nature of the buſineſs—ſhe ſaid it would be very agreeable to her to have her money; but this was not giving an authority to *loſe* her money for her.

That the attorney might have been ſure, that *Hughes* was not ſolvent, or he would not have made himſelf reſponſible for a man in ſo bad circumſtances, as the original debtor was known to be.

Mr. Juſtice *Aſton*—The queſtion is, Not whether *Jennings* ſhall be ſecurity for the bond, or, whether ultimately he ſhall be liable to an action; but whether there is ground to proceed originally againſt him *now?*

If he acted not intentionally ill, but with *good* deſign, though eventually unhappy, this is *no* ground to proceed *criminally* againſt an attorney.

Firſt, as to the bond, when *B.* offered bail and ſaid, "it's no matter whether good bail, I am ready to pay you an handſome compliment."—"No," ſays *Jennings*, "I will not conſent." Then *Hughes*, whom he ſwears to have taken for a good man, and whom I can't ſay he has ſworn falſely in ſo ſwearing, offers to put in and perfect bail, *&c.* A better offer one attorney could not make to another.

Then as to ſuſpending the proceedings on the bail bond; it appears the worſt part: But ſhe *knew* and *approved* it, as appears on her affidavit.

As to the promiſe about paying the money, ſhe knew by whom it was to be paid; and *Jennings* ſeems to have thought ſhe would have the money.

However *imprudent* it may have been, it does not appear to have been done *malo animo.*

As for *Hughes* having been diſcharged from the proceedings on the attachment, it was done after ſhe had diſcharged *Jennings* from acting for her. As ſhe may have her remedy by *action*, if it ſhould appear he knew *Hughes* not to be ſolvent, which would be very bad; the court will not grant an *attachment* in a *doubtful* matter.

Attachment will not be granted in a doubtful matter, when the party may have his remedy by action.

Mr. Juſtice *Aſhurſt*—The court will not grant an attachment but on a *clear* caſe; nor proceed *criminally*, where the conduct of a party ſeems to have been *intended* for the beſt. *B.* appears not to have been ſolvent; and, beſides, is ſince dead: So that the plaintiff would have no remedy againſt him. *Hughes is* living, does not appear inſolvent; ſo that I don't ſee but it may be better for the plaintiff.

I am of opinion with my brothers, the rule ought to be diſcharged.

RULE DISCHARGED.

ON a mandamus moved againſt the Commiſſioners of *Wavertree* for not laying out public roads according to the act of parliament.

Lord *Mansfield*—I don't think we can ſuperſede the adjudication of the juſtices, unleſs manifeſtly unjuſt.

But, though the adjudication there is made final, yet when they come into this court, to have granted them a prerogative-writ *for their aſſiſtance in the executing, the court will look into the juſtice.*

A caſe was mentioned by his Lordſhip, in which, though in an appeal from the Grand Seſſions of *Wales*, their ſentence had been affirmed by the Houſe of Lords; yet, when it came before the court of Chancery, the party having got out of the juriſdiction, Lord *Hardwicke would not grant the aſſiſtance of the court without* entering into the *juſtice* of the caſe; notwithſtanding the judgment in the Houſe of Lords.

Bail.

Rule of Practice.

Four days to put in bail, mean excluſive of the return.

FOUR days *excluſive* of the return-day to put in bail; and if the laſt day is of a Sunday, then the whole of Monday. And within the four days, it's common to have a ſummons, to ſhew cauſe at a Judge's chamber, why there ſhould not be an order of four days afterwards to put in bail.

Cochin *againſt* Heathcote.

ON a caſe out of Chancery for the certificate of the judges.

Feme covert has a power of appointment by will or deed, ſhe executes by both, and it does not appear which was prior, both were on the ſame day.

Caſe ſtated, that *Mary*, the wife of *Dodſley*, conveyed with her huſband a conſiderable part of her eſtate in 1761 by deed—to the joint uſe of her huſband and herſelf for life, and the longer liver—then to her iſſue as tenants in common. And in caſe ſhe and her huſband ſhould die without iſſue, then to be diſpoſed of in ſuch manner as by will or otherwiſe ſhe ſhould appoint, notwithſtanding her coverture. This of her eſtate in *Nottingham*; of her eſtate in *Cheſhire* in like manner; except as to her power of diſpoſal, which is by will, not by deed.

By the deed ſhe ſettles, on failure of iſſue of her and her huſband, to ſuch children of her ſiſters as ſhall be living at the death of her and her huſband, or the longeſt liver, *habendum* to ſuch children of her ſiſters as ſhall be living at her deceaſe. The will deviſes to ſuch children of her ſiſters as ſhall be living at her deceaſe. A child born after her deceaſe, and before her huſband's. Queſtion, Whether he could take? Determined—that if the deed was firſt, there being no power of revocation given; therefore the will, *quo ad hoc*, would have no effect; if the will was firſt, it being revocable in it's nature, was revoked by the deed, if the deed was contrary: That the whole, therefore, would turn upon the effect of the deed; and that by the deed, the child of the ſiſter took; the office of the *habendum* being to aſcertain the quantity and quality of the eſtate, and not to deſtroy the premiſſes.

Then ſhe ſettles among ſuch children of her ſiſters *Perkinſon* and *eathcote* as ſhall be living at the deceaſe of *her and her huſband*; *bendum*, to ſuch children as aforeſaid, as ſhall be living after her *on* deceaſe.

This will was made at the ſame time as the deed, by which ſhe ves to all ſuch children of her ſiſters as aforeſaid, as ſhall be living *her* deceaſe.

She died in 1770; her huſband in 1771. *Godfrey Heathcote*, n of her ſiſter *Heathcote*, named in the deed and will, was born *fter* the death of Mrs. *Dodſley*, but *before* the death of the huſ- and.

Contended—that the will could have no effect; that the whole perated by deed; that a jury would be very much inclined to ink *Godfrey Heathcote* (who was born of Mrs. *Dodſley*'s ſiſter ten onths and two days after Mrs. *Dodſley*'s death.) Infant in *entre ſa mere*, *living* even before her deceaſe, the time limited the *habendum*, but that *this* conſtruction was not deſired of e court; but only that the will could not be good; and the eed, which ſhe was permitted to make, being not a deed with ower of revocation, but abſolute; therefore, that having only xecuted her power by deed, ſhe could afterwards execute it to ano- her effect by will. That in the deed ſhe gave to children living fter the deceaſe of *her and her huſband*, or the longeſt liver; and, n the *habendum*, to children living at her death. That it is the ule of law, that the *habendum* cannot limit to *other* perſons than hoſe *named* in the *premiſſes*, or in a manner *contradictory* to the pre- miſſes. That, however, it might happen, either by error in the ranſcriber, on apprehenſion ſhe ſhould out live her huſband; ſhe *as* made the *habendum plainly repugnant* to the premiſſes, and deſtructive of them.

On the other ſide Mr. *Wallace*—That Lord *Coke* ſays, if a man gives to *A.* and *B.* in the premiſſes, *habendum* a moiety to one, and a moiety to the other, that the *habendum* makes them tenants in common, and only explains the deed. Co. Lit. 183.

That Sir *Thomas Jones* ſtates a variety of inſtances, where an *habendum* may enlarge, abridge, or explain.

That it ought not to be objected to her, that ſhe has made two inſtruments, a will and a deed, that her intention might take effect, by one or the other: Much leſs ſhould an intent which ſhe has ſo guarded by both, be diſappointed.

That in the will, which, if nothing elſe, is an explanatory inſtrument, ſhe gives to all ſuch children [of her ſiſter] as ſhall be living at her deceaſe.

The conditions in the deed affect ſuch children as ſhall be living at her death; therefore, if the child of her ſiſter born after her death, ſhould take, he would take, without being ſubject to the condition.

Lord *Mansfield*—This is too plain a caſe. If the deed was before the will, there is no power of revocation; if after, the deed revokes the will. It is a deed of appointment of uſes, and therefore liberally to be conſtrued. It ſeems plain, that ſhe veſts the intereſt to ſuch as ſhall be living at the time of the death of the longeſt liver of her or her huſband: And the condition to be performed by ſuch as ſhall be living at the time of the death of the ſurvivor, makes it very clear. In comes a blunder by the ſcrivener: It's plain it was a blunder. The office of an *habendum* is to aſcertain the quality and quantity of the eſtate, and therefore in the caſe by Mr. *Wallace*, of an eſtate to two; *habendum* to the one, for life; remainder to the other, in tail, the *habendum* only aſcertains and fixes the meaning of the premiſſes, but does not contradict or deſtroy them; but a gift to *A.* and *B.* in the premiſſes, *habendum* to *A.* only, was, I believe, never heard of. All the *habendum* could operate here, was to make them tenants in common, inſtead of joint-tenants: Therefore, as the will is of no effect, and the condition muſt be applied to the intent of the deed, that *Godfrey Heathcote* [the ſiſter's ſon] took, is clear.

Bail.

JEW Bail excepted againſt. He came to juſtify for 600*l.* He ſaid he was a merchant, and a Jew; that he rented an houſe of 10*l. per annum*; that he was worth a great deal more than he came to juſtify for. He was aſked, whether he carried a box about the country; he ſaid he did, but that he was worth a great deal more in the warehouſe way; that he never carried goods to leſs amount than 500*l.* He was bail in another action or two of ſome amount.

Court thought him good bail.

Undertaking.

AN attorney undertook to enter a common appearance; but, though he wrote the undertaking, he did not ſign it, but immediately retracted.

The court was applied to for an attachment, but diſcharged the ule, thinking the undertaking not ſo complete as to hinder it's beng retracted.

Coſts.

ON a queſtion, on aſſignment of bail bond, by judges order, aſſignment held good; but there was a litigation about coſts, of eight or nine ſhillings, as to which the court would not grant the ule.*

Inquiſition.

ON a motion to ſet aſide a writ of enquiry for irregularity.

The complaint was, that whereas notice had been given to execute the writ before the ſheriff, at *Guildhall*, at ſuch a day and hour, the plaintiff had procured it to be executed an hour before: And that the defendant does not believe the plaintiff can make out his demand, according to the ſum in the writ executed. That the notice was of a writ of enquiry, to be executed between ten and twelve in the forenoon; that he attended, by counſel, *before eleven*, and waited till paſt twelve: That the writ of enquiry had been executed *ex parte* only, at ten, as he was informed and believes.

On the other ſide, that the clerk of the defendant's attorney had been applied to, to know whether the defendant meant to attend by counſel, or no; that he ſaid, he did not know: That then he was deſired to ſay, they ſhould execute the writ of enquiry between ten and eleven, as near eleven as might be, unleſs by a line he was informed that ſome other time would be more convenient to the counſel who ſent. That not receiving ſuch a note, they met about a quarter before eleven, purſuant to the notice; that the jury did not execute the writ till after eleven: That they had found an average value.

Mr. Juſtice *Aſton* obſerved, that the affidavit was crammed with a vaſt quantity of unneceſſary matter, by which they ſeemed diſpoſed to crowd two motions together: And that they either came to ſet aſide for irregularity, with coſts, or elſe to be let in, on coſts, to plead the merits. That they had better confine themſelves to the former: That as to the value, that was ſuppoſed proved in evidence.

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* De minimis non curat lex.

Mr. *Wallace* ſaid, the party attended five minutes before eleven, being told they meant to execute as near eleven as might be.

The miſchief of ſuperfluous and irrelevant affidavits.

Mr. Juſtice *Aſton* obſerved, they had made their caſe *a great deal the worſe* by admitting an *heap* of *affidavits* much ſuperfluous; in great part *inſignificant*; and in ſome *falſe*. That, however, though it did not ſeem they could have much to ſay in the matter, yet that ſince a gentleman attended, with a ſerious intention of ſpeaking to the caſe, he would not take it out of their power.

Rule.

And therefore, on payment of COSTS of the *writ*, and alſo of the *motion*, let the WRIT *be ſet aſide*, on their *conſenting*, *not* to bring a *writ* of *error*. The *writ* of *enquiry* to be *executed* on *Monday* next; and, I think, yon will take care to be time enough.*

Bail.

PARISH of St. *James*, *Clerkenwell*, without ſaying in what ſtreet, too large notice. However, he being preſent in court, they agreed to admit him.

Bail.

NOT knowing how many actions he was bail in, or for what ſums, REJECTED.

Covenant.

COVENANT on articles to be the plaintiff's hired ſervant for one year and a quarter, and to pay at the expiration of the term, 200*l.* Defendant covenants that he would afterwards, at the expiration of the term, ſurrender his trade and buſineſs, as a ſilk mercer, to *J. Preſton*, the plaintiff's nephew, or ſuch other as the plaintiff ſhould appoint.

Other covenants with a *penal ſum* of a thouſand pounds.

Breach aſſigned, that the defendant *did not ſurrender* at the expiration of the term to *John Preſton*, the plaintiff's nephew, or *any other* perſon *appointed*.

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* Res contra legem acta pro infectâ habetur.

To which the defendants pleaded ſeven different counts, five of hich were at iſſue at bar *en païs*; two were on demurrer, upon hich this caſe was argued, the principal was, that the plaintiff did t find ſufficient ſecurity for the payment of the ſum ſtipulated.

Againſt this it was argued, that by the caſe 2 *Mod.* 309, recipro- l covenants cannot be pleaded in bar one againſt another. Con- ition that defendants ſhould give ſuch releaſe as the judge of the rerogative court ſhould think fit. Plea, that the judge did not ap- oint any releaſe, held not good; becauſe he ought to have tendered to the judge. Becauſe there is no covenant on the part of the dge; but where mutual covenants otherwiſe.

Vide 33 H. 6. 13. 4 H. 7. 4.

1 Lord *Raymond*, 124. Covenant that *Squire* ſhould aſſign to de- ndant his intereſt in an houſe, *&c.* and defendant pay 30*l.* Plain- ff aſſigned for breach, that defendant did not pay. Defendant leaded that *Squire* did not aſſign. Plaintiff demurs. Adjudged for im; becauſe *mutual and independent covenants:* And the parties ight have *reciprocal* actions; and that therefore the plaintiff might ring his action *before* aſſignment of the houſe: And if he did not *ſſign*, defendant might have his remedy.

French executor of Squire *v.* Trewin.

That in *Sanders*, 319. Debt on ſpecialty. Plaintiff declared, on greement produced in court, *nempe*, that defendant ſhould give to laintiff the ſum of 775*l.* for certain lands and meſſuages therein tated. Five ſhillings earneſt paid: And that defendant ſhould pay he reſidue a week after the feaſt of St. *John* the *Baptiſt* next enſu- ng. Breach aſſigned, that notwithſtanding defendant had paid the ive ſhillings, parcel of the ſum above-mentioned, he had not paid he reſidue, though often thereunto required, to the plaintiff's da- mage. The defendant prayed *oyer* of the deed, which was read him. *In hæc verba*, to wit, 11 *May*, 1668, it is agreed upon by doctor *John Pordage*, and *Baſſet Cole*, Eſq; *et quæ ſequuntur*. On *yer* the defendant demurred on ſeveral points: And *inter alia* the grand exception was, that the plaintiff, in his declaration, has not averred that he *conveyed* the lands, or at leaſt, that he *tendered* a conveyance; and that the defendant hath *no* remedy to obtain the lands, and therefore that the plaintiff could not ſupport his action, not having conveyed or tendered. But the court held, that both were to be taken as parties to the conveyance; and if the plantiff did not convey, defendant had an action of covenant againſt him. And thus, that *each party* had *mutual* remedy againſt the other.

Pordage *v.* Cole, Hil. 20 & 21 Car. 2.

Sir *John Strange*'s Reports, that in *Blackwell* v. *Naſh*, plaintiff covenants to transfer ſtock, and defendant to pay for it. Plaintiff pleads, that he was ready at the day, *&c.* to transfer, but that the

P. 535. Mic. 8 G. rot. 212.

defendant refuſed to accept or pay. On demurrer, contended th this was a *condition precedent*, and the words to pay *for it* ſhewed fo And therefore, that the plaintiff ſhould have ſhewn that he *did per form* the condition on his part, by *actual* transfer. Contended o the other hand, that the covenants were *mutual*. *Per curiam*, Th the conſideration was a *covenant to transfer*, and not *actual* transfer though if it had, *tender* and refuſal would have been a *performance* Affirmed in the Exchequer chamber..

That in *Dawſon* againſt *Myer*, on error in the Exchequer, from a judgment of the King's Bench, it is reported by *Str.* 712, that the plaintiff declared in action of covenant, that in conſideration o 738*l.* 10*s.* he covenanted to transfer the produce of 634*l.* in lottery annuities, ſubſcribed by the plaintiff, and defendant covenanted to accept and pay. Plaintiff ſets forth *tender*, and that defendant *refuſed*. Demurrer to the plea of tender: And on this demurrer the court gave judgment for the plaintiff; for that they were *mutual diſtinct* covenants. And that the covenants being *mutual*, the *tender* was to be laid *out* of the caſe, and plaintiff not obliged to anſwer to it.* And on the trial in error, *Eyre*, chief juſtice of the Common Pleas, *Gilbert*, chief baron, and four of the other judges, were unanimouſly of opinion, that the judgment of *B.R.* was right, and *affirmed* it accordingly. And the caſe was held ſo clear for the plaintiff, on the firſt opening, that there was no argument. And on error in parliament, the plaintiff ſubmitted, without bringing it to an argument, and paid the money.

It was farther argued by Mr. *Buller*, in the principal caſe before the court, that there was an authority that *one* breach of covenant could not be ſet off againſt *another*, becauſe the damages might not be equal.

Covenant to do an act at a particular time, as in the caſe of *Fletcher*, *anno octavo* of his preſent Majeſty, in *Hilary* term, there Mr. Juſtice *Yates* ſaid, the covenant is to do a thing before a particular day, and that is one characteriſtic of mutual covenants.

Here, too, if one covenant muſt be performed, all the covenants, which are many, muſt be performed, before the plaintiff can be entitled to his action.

That if the covenants were not mutual, the condition precedent lay on the part of the defendant, to have been performed by him.

Secondly, which, I think, was the point in demurrer, Mr. *Buller* urged, that even if theſe ſhould not be thought mutual, but dependant contracts, he hoped the judgment of the court in favour of his client; becauſe the act aſſigned in breach of covenant not to have

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* Lex non cogit ad ſupervacua.
Idem eſt nil dicere ac inſufficienter dicere.

been

een done, was to be dependant, if the contracts were not mutual, a precedent act to be performed by the defendant, before the aintiff was to perform his covenant.

For that after the year and a quarter's notice, it was agreed, that e defendant ſhould yield up his trade to the plaintiff. That then e partnerſhip ſhould be entered into between the plaintiff and ſuch rſon as the defendant ſhould appoint: That then the ſum agreed ſhould be paid as before.

That the articles were to be firſt executed, and plaintiff find ſufficient ſecurity.

On the other ſide, it was argued, that the condition to be per- rmed by the defendant was dependant; that the plaintiff had not rformed his, and therefore was not entitled. That the defendant as a perſon in conſiderable trade; that he had entertained thoughts putting his nephew into the ſhop, after paying off the moiety of e ſtock. That he looked out for a perſon; that a journeyman eaver was recommended; that he took him into his ſhop, to try m as a ſervant, it's ſaid; and he was to take him into the ſhop. 's true, *after* the execution of the articles of partnerſhip; that mmediately *from* and after the execution of the articles of partner- ip, the defendant ſhould permit the plaintiff and *John Preſton*, or her perſon appointed, to enter, *&c.*

Farther, that the ſecurity of 250*l.* by monthly payments, was a *recedent* condition to be performed, the defendant not relying on e reſponſibility.

That to conſtrue an independent mutual covenant, would be againſt the meaning, equity, and faith of the agreement; becauſe the defendant would be obliged to rely on a perſonal ſecurity, on which by the terms of his agreemen', he had declared he did not chooſe to rely.

If it were conſtrued, that it is an independent and mutual cove- ant, Mr. *Preſton*, the defendant, would be obliged to rely on the erſonal credit and ſecurity of the plaintiff, contrary to his own plain tention, and that of the drawer of the articles.

That at the year and quarter expired, the plaintiff at that time, nd at the houſe which was to have been entered, ſhould have ten- ered the ſecurity on which the houſe was to be entered. That on he other ſide, the learned gentleman who drew the declaration had hereon declared, he had tendered the ſecurity, but that the ſecu- ity, as was the fact, would not execute. He would not have ſta- ed this, if the *tender* of the ſecurity were not neceſſary, as a *pre- edent* condition. And therefore Mr. *Preſton*, on the ſecurity refu- ing to execute, by reaſon of non-performance of the condition on he part of the plaintiff, was not bound to his. And therefore rayed judgment.

In replication.

Mr. *Buller*—That though he believed the defendant would do imſelf as much ſervice as he could, they could judge of his inten- ion only by his deed. They have covenanted to do diſtinct acts of mutual nature. If the court conſtrues it an independent covenant, the plaintiff owing only 100*l.* ſhall not recover againſt the defendant, in caſe he owed a thouſand.

Lord *Mansfield*—This caſe has been *extremely well* argued on *both* ſides; and the *conſequence is,* the court forms a *clear* opinion.

Independent covenants.

Covenants conditional.

The *rule* of law, to be ſure *is,* that covenants *independent* cannot be *ſet off* one againſt the other. There is *another* ſort of covenants, which are, in their nature, *conditions*; and *he* who is to *perform* the *firſt* condition, *cannot* have his action till he *has* performed.

Covenants reciprocal.

There are alſo covenants *reciprocal:* * ſuch are *all purchaſes*; in which, if the ſeller is ready, *tendering* the *conveyance*, and the buyer is not ready to *pay* the money, *then* the ſeller ſhall *not paſs* his *eſtate without*.

It would be the *moſt monſtrous* caſe in the world, if the argument on the ſide of Mr. *Buller*'s client was to *prevail.* It's of the very *eſſence* of the agreement, that the defendant will not *truſt* the *perſonal* ſecurity of the plaintiff. A *court* of *juſtice* is to *ſay*, that *by operation of law he ſhall, againſt his teeth.* He is to let him into his houſe to ſquander every thing there, without *any* thing to *rely* on but what he has *abſolutely refuſed* to truſt. This payment, therefore, was a *precedent* condition *before* the covenant of putting into poſſeſſion was to be performed on the part of the defendant. †

Mr. Juſtice *Aſton*—There is a tranſpoſition in the articles, which are *ill* marſhalled. This is a mutual and independent covenant to be performed by the plaintiff antecedent to any thing done on the part of the defendant; and this being the intent and legal conſtruction, the law will ſo marſhal the words, as to give it this effect. ‡

The law will marſhall words to their true effect.

Mr. Juſtice *Aſhurſt*—Whether a condition be precedent or not, I think is always to be determined by the *nature* of the tranſaction, and the *meaning* of the parties. The tendering of the ſecurity was to be *precedent* to the aſſigning of the ſtock, and entering into the articles of co-partnerſhip. And *this* could not have *hurt* the plaintiff, who could *never* have been made *liable* to the *payment*, if the ſtock were not aſſigned, nor poſſeſſion delivered.

Condition precedent, or not, is to be determined by the nature of the tranſaction.

JUDGMENT FOR THE DEFENDANT.

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* Pacta reciproca vel utrumque ligant vel neutrum.

† Conditio præcedens infecta alterum partem ſolvit.

‡ Lex verba male collocata ad mentem et legitimum ſenſem inſtruit.

ON a motion for an information to ſhew cauſe, why a turnpike ſhould not be ſet up again, which had been taken down t a meeting of twelve of the commiſſioners; on ſuggeſtion of iregularity in the time and manner of meeting.

The court ſaid all the twelve ſhould have been moved againſt; or, if any were criminal, all were equally ſo; but that it did not eem there was any ground for an extraordinary criminal informaion.

Rule refuſed.

The King *againſt* Villers.

INFORMATION on the ſtatute 22 *Geo.* 2. againſt importing foreign embroidery, to recover 100 *l.* penalty on a ſpecial caſe; which finds, that the defendant imported the foreign embroidery made up into wearing apparel, with him in his portmanteau, and after his landing it was ſeized.

Vide 4 Ed. 4. c. 1. anno 1463.

3 *Edw.* 4. *c.* 4. an act mentioning certain merchandize, not lawful to be brought into this realm; recites the great miſchief to ſeveral artificers, by divers articles manufactured by ſtrangers, enemies, *&c.* againſt good laws, *&c.*

22 *Ed.* 4. *c.* 3. a temporary act continued by the ſtatute 1 *R.* 3. *c.* 10. tantamount to the former, for ten years.

Act 5 *Eliz.* *c.* 7. increaſing the penalties.

13 & 14 *Car.* 2. *c.* 13.

22 *Geo.* 2. *c.* 36. intitled, An act for the prohibiting the importing and wearing of foreign embroidery—recites the great ſums expended.

Enacts, no embroidery to be imported; forfeiture of ſuch embroidery as ſhall be imported.

Penalty of 100 *l.* on the importer.

Mr. *Morgan* enumerating the evil, Lord *Mansfield* ſaid, theſe were rather to the jury: The court was to conſtrue the act.

Lord Mansfield.

Mr. *Morgan* proceeded to obſerve, that the jury had found againſt Lord *Villers*, the defendant, as the importer; that the plaintiff had declared againſt him as ſuch; that this being a remedial ſtatute, the court was concerned as much as poſſible to ſuppreſs the miſchief, and advance the remedy: That Lord *Villers* had owned his having brought a vaſt quantity. That his wearing in a foreign country ſome of the clothes, would not exempt him from the ſtatute.

On the other ſide, that the jury had not found Lord *Villers* an importer, but had found ſpecially that the 3d and 22d of *Edw.* 4. 5 *Eliz.* only enacted a forfeiture of the cloaths, and other manufactures prohibited.

13 & 14 *C.* 2. recites nearly as the act in queſtion: The act carries an idea of it's being brought and imported for ſale, and not a ſyllable of them worn; forfeiture, therefore, enacted of ſuch pieces, parcels, *&c.* Forfeiture of 50 *l.* to the ſeller. 22 *G.* 2. enacts a forfeiture of the garment, but exempts the wearer from the penalty.

3d of his preſent Majeſty againſt the importation of ribbons.

c. 28. 6th of his preſent Majeſty againſt importing foreign ſilks and velvets.

The 3d of his preſent Majeſty provides, that it ſhall not be conſtrued to extend to ſuch as ſhall be worn as part of wearing apparel.

The 6th provides according to the 22d of his [late] Majeſty: That, therefore, the defendant having theſe cloaths made up as wearing apparel, though not actually, perhaps, worn, is not liable to the penalty. Mr. *Davenport*.

Replication to Mr. *Davenport*—The words of 22 *G.* 2. ſpeak of bringing over before: Whether before the act of 22 *G.* 2. garments were ſeizable, I will not contend, as Sir *Joſeph Mawbey* did when he mixed the wheat and barley.

The eaſe of avoiding the penalty by procuring foreign embroidery to be worn a day only by the importer on his voyage.

No difference between bringing over and importing.

Lord *Mansfield*—I think I muſt take it for granted this never has been a caſe before the preſent, in which the wearer is made liable to the penalty as importer: It muſt depend on the words of the he ſtatute. There were need of very *ſtrong* words to make a gen-eman, *wearing* foreign clothes, not only liable to be *ſtript*, but lſo, the *inſtant* he ſets foot on *Engliſh* ground, to the forfeiture of oo *l.*

The ſtatute 22 G. 2. recites, whereas great quantities of gold and lver thread lace, *French* and brocade are brought over for ſale, hereby great ſums of money have been expended and carried out f the kingdom; and whereas ſeveral ſtatutes have been enacted, rohibiting the ſale—therefore, the legiſlature conſiders particu-arly and ſolemnly, as to the 100 *l.* forfeiture, importation in the ay of merchandize. Accordingly taylors and milleners are made pecially liable to a penalty: Becauſe they can have them *only* in he way of trade.

Suppoſe a foreign *ambaſſador* comes over; is he and his atten-dants within the penalty, for only having a gold button on their coat?

Suppoſe a *ſtranger*, entirely *ignorant* of our native laws, comes in the cloaths of his own country; are we to *catch* every *ſtranger* likewiſe who ſhall come among us?

It is remarkable too, that the ſtatute 22 G. 2. particularly *ſpecifies* gold and ſilver *thread lace*, *French* and brocade; all of which, ex-cept the laſt, are manufactures brought over ſeparate, to be affixed to the garment here. It remained, therefore, to be queſtioned, whe-ther the garment was liable, if they were brought over worked into it? And the legiſlature ſeemed to have a doubt, which I will not ſay was groundleſs, whether the gold and ſilver lace, *&c.* ſo work-ed, was ſeizable. However, as to the ſeizure, the ſtatute particu-larly provided; but not as to the penalty when worked into wear-ing apparel: But the wearer is particularly excepted, as has been before obſerved. Lord *Villers* might as well have had theſe cloaths on his back, as in his portmanteau.

JUDGMENT FOR THE DEFENDANT.

Diſtreſs.

ON the Statute of Diſtreſſes, 27 G. 2. providing for repay-ment of ſurplus on demand; ſuing out a writ, it was con-tended, is not demand, for you ſhould make your demand before you commence your action.

Of diſtreſs, that none ſhall be diſtrained for more than is due. See Magna Charta, 9 *H.* 3. *c.* 10. Anno ſalutis 1225.

Anno 1266. Diſtreſs not to be outrageous, nor of plough cattle. Vide 51 H. 3. *ſtat.* 4.

None to diſtrain for amends of injury, without award of court. Vide ſtatute *Marlebridge*, 52 *H.* 3. *c.* 1. Nor out of his fee, *c.* 2. Nor in the highway, ſaving the king, *c.* 15. Nor in the antient fees of the church. Vide 9 *Ed.* 2. *ſtat.* 1. *c.* 9. * Called articuli cleri, * anno 1315.

Commonly called 1 Weſt. anno 1275. Diſtreſſes not to be driven out of the country, and to be reaſonable, on pain of ranſom. Vide 52 *H.* 3. *c.* 4. 3 *Ed.* 1. *c.* 16. 1 & 2 *Ph.* & *M. c.* 12.

Freeholder not to be diſtrained to anſwer of his freehold. Statute of *Marlebridge*, *c.* 22.

None to be diſtrained for another's debt. Vide 3 *Ed.* 1. *c.* 23.

The cattle of the plough not to be taken for the king's debt, if others can be found, 28 *Ed.* 1. *c.* 12. To be driven to a pound within three miles, vide 1 & 2 *Ph.* & *M. c.* 12.

Sheriffs to have four deputies to make replevin. *Ibidem*, *ſ.* 3.

Anno 1665. If firſt diſtreſs not ſufficient, it may be repeated. 17 *Car.* 2. *c.* 7. *ſ.* 4.

That goods diſtrained for rent may be ſold, if rent not paid within a reaſonable time. Vide 2 *W.* & *M. c.* 5.

Corn and ſtraw looſe, vide *ſ.* 3. Double damages for wrongful diſtreſs, vide *ſ.* 5.

Not to be taken in execution, without paying the arrears of rent to landlords. Vide 8 *Ann. c.* 14.

Goods removed, diſtrainable within five days. 8 *Ann. c.* 14. *ſec.* 2.

Within thirty days. 11 *G.* 2. *c.* 19.

That arrears may be diſtrained after leaſe determined. Vide 8 *Ann. c.* 14. *ſ.* 6.

Penalty of double value on fraudulent removing. 11 *Geo.* 2. *c.* 19. *ſ.* 3.

Cattle on the common, and crops growing, diſtrainable for rent. Vide *ibid.* *ſ.* 8.

Diſtreſſes may be ſecured and ſold on the premiſſes. *Sec.* 10.

In caſe of diſtreſs for rent, irregularity not to make it void. Vide *c.* 19.

Amends may be tendered. Vide 19 & 20.

General iſſue, 21.

Pounding in *Scotland.* 20 *G.* 2. *c.* 43. *ſ.* 23. anno 1747.

Juſtices in warrants of diſtreſs for penalty, to limit the time for ale of the diſtreſs. Vide 27 *G.* 2. *c.* 20. and the ſtatutes there re-erred to in Mr. *Ruffhead*'s edition.

Diſtreſſes muſt be of things of a valuable property: Dogs, bucks, does, and other animals *feræ naturæ*, cannot be diſtrained. Even aluable property cannot be diſtrained, when in actual preſent uſe, s an horſe, when a man or woman is riding on him; an ax in a man's hand cutting wood.

Thirdly, Things for the maintenance of trades for the benefit of he commonwealth, and there by the authority of law. As an horſe t a ſmith's ſhop, not to be diſtrained for rent out of the ſhop; materials in a weaver's ſhop; cloth of cuſtomers at a taylor's; ſacks t a mill or market.

Fourth, Nor a thing diſtrained already; for it is in the cuſtody of he law: Nothing at common law ſhould be diſtrained, which ould not be rendered in as good plight as when taken; but this is ltered as to corn, by 2 *W.* & *M.* *c.* 5. but, I apprehend, it ſtill holds as to dead poultry, dead fiſh, and the like.

Fifthly, Nor beaſts of the plough, (nor utenſils of profeſſion, as the axe of a carpenter, or the books of a ſcholar) while there are other diſtrainable goods. *Co. Inſt.* *c.* 7. *ſ.* 51.

Nor ſhall diſtreſs be taken for uncertain ſervices. *Co. Inſt. lib.* 1. *ſ.* 136. vide alſo *Burn's Juſtice*, tit. *Diſtreſs*.

A diſtreſs for rent cannot be in the night. 1 *Inſt.* *l.* 2. *c.* 12. *ſ.* 213.

Nor could a man, by common law, break open doors to take it.

A man cannot work or uſe cattle diſtrained, but for the benefit of the owner. Vide *Wood's Inſt. b.* 2. *c.* 2. *p.* 146.

By 7 *Ann.* c. 12. the goods of an ambaſſador, or other public miniſter ſhall not be diſtrained; if they are, the diſtreſs is void.

If cattle are put into a pound overt, the owner muſt feed them; and, they die for want of food, there is no remedy againſt the diſtrainer, but he may diſtrain again. And it is very remarkable, that though the divine law given to *Moſes* provided for the caſe of a bird with her young ones, for the ox treading out the corn, for the beaſt of one's enemy fallen in the way; though the *Athenians* even puniſhed with death the cruelty of a young man in putting out the eyes of quails for his ſport, yet, our law does not puniſh any, the moſt inhuman treatment of a beaſt, otherwiſe than as it may occaſion damage to the owner, * or danger immediate to the public, as by over-driving oxen, or the like: But the owner may uſe his own animal with what ſavageneſs he pleaſes; and the Law of *England*, which is a law of mercy, yet (as it has been complained ſomewhere before) hinders him not. Yet, I queſtion whether, if an owner of any animal were to commit an act of wanton and extreme cruelty on it in public, or in the preſence of any entreating him not, whether he would not be liable to an indictment at common law, as guilty of a nuiſance. For mens eyes and ears are not to be offended with outrages on humanity; nor an example of cruelty to be ſet: And whatever is againſt common morality, and committed publickly, I conceive is within the common law of *England*, vide *Jones* and *Randall infra*. This kind of digreſſion, I hope, is excuſable, as the doctrine of diſtreſſes naturally led to it; by that part of it which permits cattle to be ſtarved in the pound, if the perſon from whom they were diſtrained, does not come to feed them.

With reſpect to ſurplus in the caſe above, the court was of opinion that the ſtatute of 27 *G.* 2. was not to be interpreted, negatively, that the money is not to be reſtored, unleſs on demand; but imperatively, that it ſhall be reſtored on demand.

Rice *againſt* Denton.

CUSTOM houſe officer on the 15 *G.* 2. *c.* 25.

Queſtion, Whether the defendant had a right to regauge a caſk of rum before he granted a permit. The act ſays, the merchant may land without payment of duty, on the terms of lodging it in a warehouſe, &c. that the duty ſhall be in proportion to the gauge ken upon landing.

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*Vide 37 H 8. c. 6. 9 G. 1. c 22. 31 G. 2. c. 42. vide the ſeveral Game Acts, and the Dog Act.

There is the exciſe gauger, the cuſtom-houſe gauger, and the ty gauger; which laſt is a kind of mediator between the other wo.

Contended, that the officer ſhould deliver up immediately, withut ſecond gauging.

On the part of the defendant—That the ſtatute of *C.* 2. enacted e duty before landing; that in order to remedy this inconveninnce, the ſtatute 15 *G.* 2. allows them to lodge rums of the prouce of the *Weſt Indies* in ware-houſes to be approved by the cuſom-houſe officers: On producing the certificate from the collector, he officer is to grant a permit. The proviſion is, that he ſhall dever the rum in ſuch quantity as is expreſſed in the certificate. Queſtion, Whether the gauging always ſo concluſive, that the offier ſhall never be at liberty to regauge. That though the ſtatute eemed to think, that the ſame quantity would always continue, badneſs of the caſk, and a thouſand other circumſtances, would exeedingly alter the quantity. The crown having enlarged the time or payment of the duty, firſt to ſix months, and afterwards to welve months, favourably to the owners, if there be any loſs, it ought to be to the proprietor, and not to the crown; that the ceriſicate, therefore, from the collector, is to be the meaſure of the duty. If any loſs, the proprietor muſt abide it, and not have quanity delivered which is not there, being loſt. That it was intendd the officer ſhould know what he was to grant the permit for, nd that multitudes of frauds muſt ariſe, if he has not that right.

Vide allowance for waſte, 22 & 23 C. 2. c. 5. ſ. 3.

On the other ſide it was contended, in reply, that no fraud from the time of the ſtatute to this had happened, for want of ſuch a power to regauge. That he is merely intruſted with the charge of keeping, and the care of the warehouſe, and has no diſcretionary power as to the permit.

Lord *Mansfield*—I do not know, as it may be neceſſary, perhaps, to apply to parliament, whether you ought not to do it as ſoon as poſſible.* It does not appear by the cuſtom interpreting the act till 1772, nor by any act in being. It's apparent where the fraud is: *Smuggled* or *adulterated* goods may be brought in, to the *injury* of the *revenue*.

Ale not to be mixed after gauge taken, vide 22 & 23 C. 2. c. 5. ſ. 11. 7 W. 3. c. 30.

JUDGMENT FOR THE PLAINTIFF.

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* Indicis eſt jus dicere non dare.

Anno 1660. OF exciſe laws, ſee 12 *Car.* 2. *c.* 23, the beer and ale exci
granted to King *Charles* for life. 1 *G.* 3. *ſt.* 1. *c.* 1.

Vide 1 Ventris, 72. Duties on foreign liquors to be paid by importer, vide 12 *Car.*
c. 23. *ſ.* 14. 15 *Car.* 2. *c.* 11. *ſ.* 17. 22 & 23 *Car.* 2. *c.*
ſ. 9.

Oaths of officers of the exciſe, 12 *Car.* 2. *c.* 23. *ſ.* 33.

Hereditary exciſe, 12 *Car.* 2. *c.* 24. *ſ.* 15. By this ſtatute
duties were made payable by importers before landing.

Commiſſioners not to take exciſe to farm; penalty of bribing exciſeman; exemption of colleges; directions for landing; where appellant ſhall have coſts; exciſe offices to be kept in market-town
vide 15 *Car.* 2. *c.* 11. *ſ.* 2, 16, 21, 17, 19, 10.

Vide Burn, ſirſt vol. Powers of commiſſioners given to farmers of the exciſe, 16 &
Car. 2. *c.* 4.

Additional exciſes expired, vide 22 & 23 *Car.* 2. *c.* 5. 29 *Car.*
2. *c.* 2. 1 *W.* & *M.* *c.* 24. 2 *W.* & *M.* *ſt.* 2. *c.* 3. & *c.* 10.
3 *W.* & *M.* *c.* 1. 5 *W.* & *M.* *c.* 7. 7 & 8 *W.* 3. *c.* 30.

Power to juſtices or commiſſioners to mitigate fines, 22 &
Car. 2. *c.* 5. *ſ.* 8.

Certioraries not allowed in proceedings on exciſe, *ſ.* 14.

Vide alſo, 1 *W.* & *M.* *ſt.* 1. *c.* 24. 2 *W.* & *M.* *c.* 3. 4 *W.*
M. *c.* 3. 5 *W.* & *M.* *c.* 20. 4 *An.* *c.* 6. Vide the act 1 *G.*
c. 12. for appropriating duties to the aggregate fund.

Vide 1 Burn. Powers and directions for preventing the concealment of liquo
and other frauds, 7 & 8 *W.* 3. *c.* 30. Vide 8 & 9 *W.* 3. *c.* 19. Vid
18 *G.* 2. *c.* 26. *ſ.* 8. Vide 10 *G.* 3. *c.* 44.

Weekly ſum of 3700 *l.* to be paid out of the exciſe revenue,
a fund, vide 12 & 13 *W.* 3. *c.* 12. made perpetual 6 *G.* 1. *c.* 4.

Commiſſioners and officers to be ſworn, vide 10 *An.* *c.* 19. *ſ.* 12
c. 26. *ſ.* 75.

Penalty of obſtructing an exciſe officer, 6 *G.* 1. *c.* 27. *ſ.* 7.

Pow

Power by warrant to ſearch houſes, vide 11 *G*. 1. *c*. 30. *ſ*. 2. Vide rules for taking out permits, *ſ*. 10. Proof to be admitted of is authority, without producing his deputation, vide *ſ*. 32.

Directions on ſeizure of tea, coffee, *&c*. vide 12 *G*. 1. *c*. 28.

Three commiſſioners impowered to act, vide 1 *G*. 2. *c*. 16. *ſ*. 4.

Duty on ſweets leſſened, 10 *G*. 2. *c*. 17.

Puniſhment of perſons going armed in defiance of exciſe laws, vide 19 *G*. 2. *c* 34. 11 *G*. 3. *c* 51.

Offences againſt exciſe laws excepted out of general pardons, vide 20 *G*. 2. *c*. 52.

Summons left at offender's houſe to be deemed good notice, vide 2 *G*. 2. *c*. 17.

Power to ſeize forfeited veſſels, 33 *G*. 2. *c*. 9. *ſ*. 16.

Additional exciſe, 1 *G*. 3. *c*. 7. *ſ*. 1.

Vide of other points relative to exciſe, 5 *G*. 3. *c*. 43.

Greſham college purchaſed for an exciſe-office, 8 *G*. 3. *c*. 32. For defraying the expence, vide 10 *G*. 3. *c*. 32. 12 *G*. 3. *c*. 46.

Feltham and others Churchwardens, *againſt* Terry, or Tyrrel, and others, Overſeers.

Action of Trover againſt the Overſeers, on the Caſe following.

A Churchwarden was convicted on the ſtatute for neglect of duty; the overſeers of the poor levied the penalty, and did not account for the ſurplus, nor apply to the uſe of the poor. Conviction quaſhed: The churchwardens brought an action for money had and received againſt the overſeers; on which, upon a ſpecial caſe for the opinion of the court, the queſtion was, whether, on the circumſtances of this caſe, an action for money had and received would lie; or whether trover ought not to have been brought, or ſome other action of treſpaſs?

Plaintiff may waive a tort, and bring an action purely of a civil nature, where it is for the benefit of the defendant.

Lord *Mansfield* delivered the judgment of the court to this effect, *May* 8, 1773.

We took this matter of the caſe of *Feltham* againſt *Terry an* *others* into conſideration. A churchwarden was guilty of neglect o duty, under the ſtatute. On conviction before the juſtices of peace the overſeers of the poor levied the penalty, and there remained ſurplus of twelve ſhillings; on the refunding of which we go. I appears, they did not account, nor apply to the uſe of the poor The churchwardens brought an action for money had and received againſt the overſeers, the conviction being quaſhed. It was a *tor* therefore; and it has been ſaid, that an action for the detainure ſim-ply, was not proper: For that an action of *trover*, or *treſpaſs*, migh have been brought.

However, we are *clear* that the party may *waive* the *tort*; whic if he does, *it is to his own prejudice*, and in *favour of the defendant* He cannot then come for damages; he cannot ſay, if the goods ar ſold, that they were double the value the defendant ſold them for *Here nothing can be recovered* but what is *conſcientiouſly due*; *nothin* *but the real value*; and the defendant loſes *no defence* which he *ca* make *bonâ fide*; whereas in an action of treſpaſs, it would have bee *no legal* juſtification to ſay, they acted *ex officio*.

Before Lord *Hardwicke*, *Cheeſeborough and another* againſt *More-ſon*, on an *indebitatus aſſumpſit*. *Moreſon* received money of a bank-rupt, as the price of goods the aſſignee came to recover. It wa ſaid, he cannot affirm and deny; alledge the contract, and avoi it.* The caſe of *Hope* and *Whip* was cited; which was, the de-fendant was indebted to one who died inteſtate; defendant *took* the money *ſecretly*, ſomething very like *ſtealing* it.† It was ſaid, the ad-miniſtrator who ſued in the name of the inteſtate, from whom th money was taken, could not bring an *indebitatus aſſumpſit*; but i was agreed, he might *waive* the *tort*. Lord Chief Baron *Parke* ſaid, in that caſe, that this action would lie in *every* caſe, but tha of money *won* at play; and that it would by the aſſignee to recove money paid by a bankrupt. Mr. Juſtice *Aſton* has a note of a judg-ment very *ably* given in the Common Pleas, which, for the ſake o the *Bar*, I would deſire him to cite.

Mr. Juſtice *Aſton*—The caſe to which his Lordſhip alluded, and has deſired me to cite, was *Hitchin and others*, aſſignees of a bank-rupt, againſt *Campbell*. Judgment and execution on *indebitatus aſ-ſumpſit*, againſt the banker, levied to the amount of 1500*l.* in 1769: The ſame year the bankrupt was found to have committed an ac of bankruptcy. They ſue the ſheriff to recover the money levied. It appeared afterwards, that he had committed an act of bankruptcy n *February*, which was before the execution. Lord Chief Juſtice *De Grey* ſaid, that the effect of a *commiſſion* was to *diveſt any* eſtate ut of the bankrupt; but *before* the *commiſſion* the *act* of *bankruptcy* *iveſted nothing*. The ſheriff taking the goods, *no* commiſſion having ſſued, is *no* treſpaſſer; but if he has them in poſſeſſion, and has not ſold them, *trover* will lie. But here, when he has ſold the goods, an *indebitatus aſſumpſit* will lie.

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* Allegans contraria non eſt audiendus.

† Ex maleficio non oritur contractus.

Trover for the lawful coming by and unlawful detainer.

An indebitatus aſſumpſit held good in the room of trover.

Vezey, 326.

[In *Levins*, 1 part 142. *Elſhington* v. *Doſhunt*, not *guilty* was held a good plea, on *indebitatus aſſumpſit*, which it would not have been, if nothing including in it's nature a *tort* could be ſued for by this action; and though the plaintiff *waives* the *tort* by bringing this action, yet the defendants being permitted to plead not guilty, ſhews that it may be brought where denying of the *tort* is a ſufficient denial of the action; becauſe it is a denial that the plaintiff had any civil cauſe of action where the civil right depends on the *tort* committed.

That Lord *Raymond*, 742, *aſſumpſit* will lie for money paid by order of an illegal court.]

That in earlier caſes, it appears this action has been adopted as a very beneficial one, by taking away wager of law. That it has been queſtioned, whether the purchaſers under the bankrupt are liable; but they come in by his title: And whoever *takes* the money, *implies* a promiſe to do what is juſt.*

I think this action of the churchwardens is the *faireſt*, and moſt *equitable* and *juſt* that can be.

Postea returned for the Plaintiff.

Of churchwardens, vide 3 *Car*. 1. *c*. 3. *ſ*. 2. 21 *J*. 1. *c*. 7. *ſ*. 5. and ſtatutes relating to nonconformiſts, poor, *&c*.

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* Lex quemlibet feciſſe præſumit quod lege fieri debuerat.

Note, There is a *niſi prius* caſe Lord *Raymond*, 742. *Mead* v. *Death* and *Pollard*, where it was held, that for money paid as coſts, on order of removal, which order was after quaſhed, *indebitatus aſſumpſit* would not lie. But Lord *Raymond* ſeems to have doubted, and ſays, the money was paid by churchwardens and overſeers both, and the action brought by the churchwardens only.

Note too, That in the part of Mr. Juſtice *Aſton*'s judgment, between theſe marks [ ] I am ſomewhat uncertain whether I have taken the very caſe cited.

A counſellor or attorney ought not to be choſen churchwarden, and if he is, he may have a prohibition, by reaſon of his attendance on the courts of *Weſtminſter*.

Diſſenting teachers, or perſons in holy orders.

Other diſſenters, not being teachers, may find ſubſtitutes.

Perſons who have proſecuted a felon to conviction, exempted in that pariſh. Vide *Burn*, firſt vol. title *Churchwardens*.

Earl of Sandwich *againſt* Miller.

Scandalum Magnatum.

A peer may lay his action of his ſcandalum magnatum, where he pleaſes: But on juſt ground of ſuſpicion, that there cannot be a fair trial, the venue ſhall be changed; otherwiſe not.

ON a motion on the part of the defendant, ſuggeſting, that an impartial trial could not be had in the county of *Middleſex*, by reaſon of the high office, weight and influence of the plaintiff in that county, as a peer of the realm, and firſt commiſſioner of the admiralty, and praying leave to change the *venue* from *Middleſex* to *London*, where the cauſe of action aroſe. The action was brought by Lord *Sandwich* againſt the defendant, as publiſher of a libel, reflecting on him falſely.

Mr. *Wallace*, againſt the motion—That the plaintiff's being a peer of the realm, and firſt commiſſioner of the admiralty, was nothing to the jury of *Middleſex*, any more than to any other jury.

That the caſe of Lord *Shaftſbnry* was very different, being on an indictment of conſpiracy brought by him againſt certain perſons, for falſely indicting him of high treaſon: And they alledged that he had great influence with the ſheriffs. What influence has his Lordſhip with Mr. *Oliver* and Sir *Watkin Lewes*? That they alledged in that caſe, that the witneſſes were afraid to come up; that they had been barbarouſly uſed in the preſence of the court. Is there any thing like in this caſe? What intereſt Lord *Sandwich*'s office might give him at *Portſmouth* or *Plymouth*, I don't know; but it does not ſerve him much here.

Mr. *Manſfield*—That he did not know what particular intimacy Lord *Sandwich* had with the freeholders of *Middleſex*; but he believed, their particular affection for him did not operate very violently. That he did not think the freeholders on one ſide *Temple Bar* were ſo very different from the freeholders on the other.

Mr. *Dunning* declared that he was ready, if neceſſary, to have iven his aſſiſtance to clear Lord *Sandwich* from the imputation of is new acquired popularity.

Serjeant *Glynn* for the defendant—That Mr. *Miller* had declared is apprehenſion of a *Middleſex* jury, that whatever the reaſons of is apprehenſions might be, it would make no difference as to the rouble of producing witneſſes; that the cauſe of action aroſe in *Lon-on*; that though it was held in the law a caſe of *ſcandalum magna-um*, gave him a power to lay his *venue* where he pleaſed; and, tho' he authorities might ſeem too ſtrong to be over-ruled, yet he hoped, f it was ſtill open, their Lordſhips' breaſt would not incline to uch a determination: That the reaſon given that a lord's character as injured in every country, was equally applicable to any other an of any notice in the world.

That he imagined the ſlighteſt objection from ſhewing cauſe of pprehenſion, would be ſufficient with their Lordſhips to obtain a emoval of the *venue*, which would be only purſuing the principles f law. In motions for change of the *venue*, the court is not an-ious to know how far the excuſe is grounded. Lord *Shafteſbury* ad his *venue* laid rightly; and yet very *little* matter was *there* hought neceſſary to *change* the *venue*.

That in the caſe of Lord *Gerard*, an action was brought for words, nd the *venue* was changed; *becauſe*, per *curiam*—he ſhould not as *peer* take an advantage which might *prejudice* the defendant.

Lord *Mansfield*—The *law* is extremely *clear*, admitted by the ounſel, admitted by the motion, that for ſcandalous words a peer nay lay the *venue* where he pleaſes. There are many other caſes in which the *venue* may be laid *any where*. If a *ground* is ſhewn, the court will grant a change of the *venue* for a fair trial. But are the freeholders of *Middleſex* ſuch deſpicable wretches, that a peer would have more weight with them than a cobler? And as the defendant has the knight of the ſhire for his counſel, I ſuppoſe that will be a full counterbalance.

RULE DISCHARGED.

Of *ſcandalum magnatum*, vide 3 *Ed*. 1. *c*. 34.

Maxims of Law.

Ex maleficio non oritur contractus.

Par ſcientia pares contrahentes facit.

Inſurance.

Inſurance.

On a motion for a new trial.

The cauſe had been tried, and a verdict found by a ſpecial jury of merchants.

It appeared that the defendant had inſured a ſhip which was to ſail from *Poole* to *Newcaſtle*, for 1000 *l.* This ſhip was loſt; and *after* the loſs, defendant writes to deſire the inſurance may be increaſed. The letter is dated on a day when no poſt went out; the next day, the account of the loſs of this veſſel is in the papers; but the defendant does not take out the letter or retract. The notice and the loſs being diſcovered, the under-writer ſues againſt this inſurance as fraudulently obtained, and void.

The queſtion turned principally on when the ſhip to be inſured was to ſail, and whether it was in port or no, at the time of the inſurance procured; and whether the defendant knew of the loſs when he wrote for the additional inſurance?

The jury found for the defendant.

The plaintiff ſaid, he believed the ſhip was in port when he inſured, at the time of making the inſurance, becauſe the wind had been eaſterly ſince he arrived at *Poole*. The plaintiff too complained, that the letter he received from the captain of the veſſel was either falſified as to the date, or being put in on a day when no poſt went out, he ſhould have taken it out of the office and diſpatched another ſome way more expeditiouſly.

The letter was to this effect: "Depend upon it I ſhall uſe all "expedition, and ſail the firſt opportunity; every thing is ready."

He complains that he had no notion when the ſhip would ſail; and that this intelligence did not arrive in time, he believes fraudulently; the letter being dated on a day when no poſt goes out.

On the other hand it was ſaid, 'twas ſtrange the plaintiff, being in *London*, having this buſineſs of inſurance in contemplation, and curious to know when the ſhip would ſail, or whether it had not ſailed already, ſhould not do what any the idleſt man in the world would have done, either go into a coffee-houſe, or read a newspaper. If he had, he might have ſeen that ſhips had gone out about the time that this ſhip of the defendant's did go, and were loſt; that as to the date of the letter, it was very remarkable that the underwriter ſhould not take notice of this, either miſtake or miſreppreentation, till the ſhip was loſt; which, it was obſerved, looked ke unaccountable laches or craft on that ſide. That there was, at eaſt, a counterbalance of evidence, on which a ſpecial jury of merhants were extremely competent to decide; * and that the court, ſuch a caſe, would hardly interpoſe. And that though a full iſcloſure is required by the law of inſurance, yet it muſt be ſupoſed of ſuch circumſtances, of which it would not be natural to magine the plaintiff was better informed than the defendant; the ontrary of which, it was alledged, ſeemed here.

Lord *Mansfield*—'Tis very proper that all matters, eſpecially of his nature, ſhould be ſo conducted, that the party *guilty* of *fraud*, ay ſee they are *not like* to *gain* by it. It is always by *circumances* that *fraud* is *diſcovered*. And 'tis very remarkable here, hat this gentleman inſured in *London*, from *Poole* to *Newcaſtle*, 000 *l.* only. That *after* the time when the account came to *Poole* f his ſhip being *loſt* in paſſing to *Newcaſtle*, he writes for a *farther* nſurance. It *may* be diſcovered, whether he did not *actually* read he paper which gives this account; it *may* be diſcovered *when* this etter was put into the poſt; which, it was *ſtrange* a man of buſieſs ſhould ſend, when *no* poſt went out, and without waiting for *hat* news *that* or the *next* ſhould bring; and, that on the *next* day's ntelligence, he did not correct his notice. Something too may be ollected from any *indorſing* that may appear to have been made by he office, importing the time on which the letter went out. I remember a caſe at *Poole*, which turned on that only. I *never* have ny difficulty in altering my opinion: At firſt, I thought the mater *ſuſpicious*, afterwards I doubted; and am *now* returned to my ormer opinion.

Vide Da Coſta againſt Scandret, Parker's Laws of Shipping and Inſurance, p. 311. and Seaman againſt Fonnereau, p. 322. Dolus & fraus legibus invisa Nil calliditate ſtultus ex facto jus oritur.

RULE MADE ABSOLUTE FOR A NEW TRIAL.

Point reſolved by Lord *Mansfield* at *Niſi Prius*.

WHEN the principal is made liable by the bill being delivered to him, though the agent agrees for payment, you ay charge the principal.

Jury.

A Juryman being put on the pannel, excuſed himſelf on account of age, being eighty.

Exemption from ſervice on a jury on account of age.

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* Cuilibet in arte ſuâ eſt redendum.

Lord *Manſfield* diſcharged him, and ſaid they did *very wrong* t put him on the pannel.

Of exemptions from juries, vide Statute of Weſtminſter 2 13 *Edw.* 1. *c.* 38. that old men above the age of ſeventy, perſon continually ſick or diſeaſed, at the time of ſummons or not dwelling in the county, ſhall not be ſummoned.

Apothecaries within *London* and ſeven miles thereof, being fre of the company, and country apothecaries who have ſerved ſeven years apprenticeſhip, ſhall be exempted from ſerving on juries, and their return ſhall be void, unleſs they voluntarily conſent to ſerve.

Clergymen cannot be impannelled on juries.*

Diſſenting teachers qualified under the toleration act, exempted from ſerving as jurors.

Quakers. And of ſuch of theſe privileges as are ſince the ſtatute 13 *Edw.* 1. the jurors ought to come in *perſon* and claim their privilege, for the ſheriff cannot return it; and if any anſwer be made, the *jury* muſt try it.

Counſellors, attornies, clerks and other miniſters of the king's courts, are not to ſerve on juries.

A lord of parliament ſhall not be returned on a jury: But if he is, the pannel is not void; but he may challenge to it himſelf, or the party may challenge him.

Tenants in antient demeſne, miniſters of the foreſt out of the 18. foreſt, coroners, officers of the ſheriff, &c. vide the writ *De non ponendis in aſſiſa et juratis.*

Perſons may be exempted by the king's charter; yet, in a grand aſſize, perambulation or attaint, ſuch exemption ſhall not ſerve, † vide 52 *H.* 3. ſtatute of *Marlebridge*, *c.* 14. which ſays, *de chartis vero exemptionis et libertates*, &c. as touching charters of exemption and privilege, that thoſe who obtain them ſhould not be put in aſſizes or juries, or any recognitions, it is provided: That if their oath be ſo neceſſary that without them juſtice cannot be done, (as n the grand aſſize and perambulations, and deeds or writings of greements, where witneſſes are named, or attaints or the like) that ey be compelled to ſwear, ſaving to them otherwiſe their privi-ege and exemption as aforeſaid.

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* Nemo militans Deo implicet ſe negotiis ſecularibus.

† Neceſſitas publica major eſt quam privata. Vide *Bacon's Law Tracts.*
Non poteſt rex gratiam facere cum injuria alterius
Rex non poteſt facere injuriam,
Lex communis ita prærogativam regis admetita eſt ut ne cujus hæreditatem tollant lædantve. Vide *Plowden.*

Anno ſalutis 1267.

In *Berkley*'s caſe, and ſome excellent learning in *Nicholles* verſ. *icholles*, vide *Plowden*'s caſe by the ſame admirable reporter.

Tickell *againſt* Read.

ACTION of aſſault and battery, defendant pleads the general iſſue, not guilty; and alſo a ſpecial plea in juſtification, hat he aſſiſted his ſervant, whom the plaintiff was beating.

Contended, that the law will not juſtify a maſter interpoſing on n aſſault againſt his ſervant, by aſſaulting the perſon who beats the ervant, as it does a ſervant in like caſe interpoſing for his maſter; ecauſe it was the duty of the ſervant, who was hired to ſerve and e aſſiſtant to his maſter's perſon, but not ſo the maſter to the ſer-ant.

A maſter may juſtify the aſſault, that the plaintiff was beating his ſervant, and that he prevented him, which was the aſſault, &c. of which the plaintiff complains.

On the other hand it was contended to this effect nearly; the uty of maſter and ſervant was reciprocal; and if the ſervant owed o the maſter fidelity and obedience, the maſter owed to the ſervant rotection and defence; and might, therefore, well juſtify by this lea.

Vide Co. Inſt. 65. of the reciprocal duties between lord and tenant.

Lord *Mansfield*—I *cannot* tell them a *maſter* interpoſing when his *ervant* is *aſſailed*, is not *juſtifiable*, under the circumſtances of the aſe, as well as a *ſervant* interpoſing for his maſter: *It reſts on the elation.*

Note, that *Burn* cites *Hawkins*, that there are opinions a maſter ſhall not forfeit a recognizance for breach of the peace for beating another in defence of his ſervant; but *Burn* cites alſo *Salkeld* 407. that a maſter cannot juſtify, becauſe he might have an action for the loſs of his ſervice. But the reaſon of the caſe ſeemed there (and *note*, it was not the principal caſe, but a caſe cited in argument) that the defendant pleaded an aſſault in defence of his poſſeſſion, (which was, conſidering his ſervant too much, as his goods and chattels, and, as far as tha was the ground of his defence, he had his remedy by action for the loſs of the value of his ſervice) but if he had juſtified that he did it in defence of his ſervant, I ſee no reaſon from that caſe, or any principles of juſtice or law, why the plea might not have been allowed; for when a ſervant defends his maſter, it is not for his own ſake, but for his maſter's; and when the maſter defends his ſervant, a man like himſelf ſuſceptible of wounds and injuries, an *Engliſhman*, or at leaſt free by being in *England*, a perſon under his ſpecial protection, it ſeems to be very far from ſufficient to ſay, the maſter needed not to have been a loſer if his ſervant's bones had been broken; for he might have recovered in an action for loſs of ſervice. What compenſation or benefit is this to the ſervant? And the *true* juſtification, I take it is, that he did it in defence of the ſervant, and by obligation of that protection which he owed him for his ſervice. And on the whole, I think, a maſter would much better deſerve to loſe the benefit of an action for loſs of ſervice, if he did not defend his ſervant when he was able from a violent aſſault, which might endanger his limbs or life, than that he ſhould be precluded from giving that defence, becauſe truly, let what will fall to the ſervant ſhort of death, the maſter may recover in damages, and ſhall only loſe and be puniſhed, if he gives that defence which he owes in a caſe of danger and unjuſt aſſault to his ſervant, not having performed all the duty of a maſter barely by paying his wages.

Den, on the demiſe of Vernon, *againſt* Ogle and others.

QUESTION, whether ſettlement voluntary or for valuable conſideration?

By deed in 1712, father ſettles upon his ſon, in conſideration of marriage and the portion his wife was to bring him, to the ſon for life, to his wife for life, remainder to the iſſue male of that or any other marriage, remainder to *Francis Ogle* the defendant.

In 1723 another ſettlement, in conſideration of marriage of his ſon with a ſecond wife, to the ſon for life, to the wife for life, remainder to the iſſue of his ſon by his firſt wife.

Argued, that the iſſue of the ſecond marriage ſhould take before the defendant.

Jenkins verſ. Keymis in Excheq. vide alſo 237. the opinion of the Ld. Keeper Bridgman.

1 *Lev.* 150. conſideration of firſt marriage extended to the iſſue of a ſecond marriage.

2 *Peere Williams* 485. *Oſgood* againſt *Strode and others*, before Lord *Macclesfield*.

Father and ſon, on the ſon's marriage, article to ſettle lands on the huſband for life, remainder to the wife for life, remainder to the iſſue male of the marriage, remainder to the nephew in fee. If the ſettler had the ſole intereſt in himſelf, the limitation to the nephew voluntary; otherwiſe, if the ſon had an intereſt, ſo that without im the father could not make the ſettlement; for then it ſhall be nderſtood that the father ſtipulates with the ſon that he will come nto the agreement, if the ſon conſents that on failure of the precedent limitations, the eſtate ſhall go over to the nephew.

Lord *Mansfield*—If a father, on the marriage of his ſon, ſettles n eſtate, it is an eſtabliſhed rule, *before* all caſes, that nothing is *ore common* than to limit over to a *younger* ſon, on failure of iſſue f the *eldeſt* ſon.

Rule.

Deed of ſettlement, 1712. Settlement in general terms, in favour f all the ſons and daughters of the eldeſt brother, before the iſſue f the younger.

The leſſor of the plaintiff's title ſprings out of the ſettlement in 723. The parties are, the father and his two ſons on one part; *A. Mills*, the intended wife, on the ſecond part; and the truſtees on he third part.

If the ſettlement is ſet aſide, it muſt be on the *27 Eliz.* againſt raudulent conveyances. The leſſor muſt ſet aſide the firſt ſettlement as fraudulent, and claim under the ſecond ſettlement as a purchaſor. This act, by the *preamble*, *body*, and *whole tenor*, is provided againſt *injury* to be done to *honeſt purchaſors*, by making the conveyance void againſt purchaſors *only*.* If the ſettlement is ſet ſide as *fraudulent*, it muſt be only becauſe it's voluntary.

Conſtruction of 27 Eliz.

In the ſettlement of 1723, the ſettlement on the eldeſt ſon is on a *valuable conſideration*, the payment of four hundred pounds out of his wife's portion, to *Philip*, the father. There is *no conſideration* with reſpect to *Francis*, under *whom* the leſſor claims: Therefore *Francis*, on a voluntary conſideration *merely*, ſhould not ſet aſide his brother from taking according to the deviſe of 1712.†

Neither law nor equity will aid one volunteer againſt another.

In 1728 a deed of ſettlement is made, reciting the deed of 1712, and a ſecond marriage takes place, between the eldeſt ſon and *Jane Wilſon*, on the faith evidently of the deed. Suppoſing you have it againſt you on the other deed, can you lay any title under the deed of 1728? What was done with the deed of 1712?

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* Perquiſitum eſt ad quod quis pervenerit facto aut aſſenſu ſuo non deſcenſu neque delicto. V. 3 Inſt. 3.

† In pari cauſa potior eſt conditio defendentis.
Conſideratio bona eſt ſanguinis vel affectus naturalis.
Conſideratio æſtimabilis eſt matrimonii vel pecuniæ. V. Twynne's caſe, 3 Rep.

[It was anſwered, it continues in the hands of truſtees, who have done no act to paſs the intereſt out of them.

Mr Juſtice *Aſton* ſaid, Why, the truſtees executed the deed of 1723.

Lord *Mansfield* continued—The whole turns upon the deed of 1723. If the truſtees thought any thing of the deed of 1712, the conveyance is fraudulent.

In the ſecond there is a limitation to the heirs general of the eldeſt ſon by the firſt marriage; he giving up the general eſtate-tail to his iſſue-male by any marriage. Whether this were a miſtake or no, there is an immediate limitation in favour of *Francis*.

It was ſaid, if the repreſentative of *Philip*'s daughter by the ſecond marriage ſhould take, it would be againſt his own bargain: And that, probably, the failure of iſſue of the firſt marriage was an event not in contemplation of the parties at the time of the ſettlement in 1723.

Mr. Juſtice *Aſton* cited *Doe*, on the demiſe of *Hammerdon*, againſt *Wilton*.

Bankrupt.

ON a queſtion, Whether an innkeeper ſending out wine, dealt as a chapman in liquors, or no; the court would not determine, but left it to the jury, as depending on the quantity in evidence.

Warrant of Tranſportation.

QUESTION, on entering into a recognizance for tranſportation, Whether this court, or the judges of aſſize, were entitled to fix the time in which the party recognizor ſhould tranſport himſelf.

V. 4 G. c. 11. Mr. *Cowper* urged, the general ſuperintendency of this court, wherever a recognizance was to be entered into with the crown; and therefore, that the power was always diſcretionary in this court, as to the time in which the party ſhould tranſport himſelf.

James *againſt* Price.

Action of Trover. Caſe from the Devon *Aſſizes.*

AGREEMENT for the exchange of the *Folly*, the plaintiff's veſſel, for the *Rooker*, the defendant's veſſel. The plain- f was to give twenty-five guineas to boot; and if the *Folly* was ſt in the voyage ſhe was then upon, then thirty guineas beſides. he plaintiff paid a guinea earneſt.

The defendant wrote to the plaintiff an excuſe for not ſending e *Rooker*, becauſe it had been previouſly ſold to Lord *Courtney*.

The plaintiff deſired his peremptory anſwer; becauſe if the *Folly* as loſt, it would be to the defendant's hurt. He afterwards ten- ered the twenty-four guineas, a guinea being deducted on account f the earneſt paid; but the defendant would not accept. After- ards, the *Folly* was loſt on another voyage. The plaintiff brought *rover* for the *Rooker*, the defendant's veſſel.

It was contended for the plaintiff, that the earneſt having been aid, and tender of the reſt of the money, was equivalent to an ctual delivery and payment. That *trover* was a good action to re- over property *tortiouſly* converted, though the actual poſſeſſion was ever in the party: For that the property was veſted.

Vide Reynolds *and* Golightly, ſupra.

Cro. Eliz. 866. Action of detinue for certain parcels of plate. Contended, that as there was no delivery actual by bailment, but nly bargain and ſale, detinue would not lie. But held well enough, nd the condition being performed, that he ſhould have the plate gain. And though the caſe was that the plaintiff had ſold the plate o the defendant, upon condition, that on payment of ſuch a ſum, on ſuch a day, the indenture ſhould be void; and though the ſum was paid at the day, yet there being an indorſement on the deed, by conſent of both, that if the plaintiff ſhould pay ſuch a ſum on ſuch a ſubſequent day, he ſhould have them again, this was held ſufficient for the plaintiff to maintain detinue of the goods, though by the defendant's paying the ſum at the firſt day, they had ceaſed to be the property of the plaintiffs; and if detinue would lie, ſo would trover; and if trover would lie in that caſe, ſtill more in this.

Bateman *and* Elman.

Mr. *Mansfield*, on the other hand—That the plaintiff could not recover by this action: That whether on hearing witneſſes, they would be able to recover on *aſſumpſit*, was uncertain: But that *no* property was *transferred*, which is neceſſary to ſupport trover. That to ſay, it is a tortious converſion, is begging the queſtion. That in a caſe from *Roll*'s Abridgment, (which had been cited on the other ſide by Mr. *Cowper)* there was delivery from *A.* to *B* for the benefit of a third perſon; the property *actually paſſed* from *A.* and *veſted* in the third perſon, by being *transferred* to *B.* who repreſented that third perſon. That the caſe in *Croke* appeared to be only that the vendor of goods actually ſold, on tender of money, recovers againſt the vendee. That a caſe in *Bulſtrode* (which had been cited) ſeemed juſt like that in *Roll*'s Abridgment: That in the caſe in *Cro. Eliz.* the money being paid, it is the ſame as if he had never ſold, the condition being performed: And the condition being a part of the deed, the property never paſſed from the owner, other than conditionally.

Replication.

Mr. *Cowper* replied, that Mr. *Mansfield* at leaſt ſeemed to admit, that the plaintiff, ſome way or other, was entitled, diſputing only, whether by this action.

That in an *aſſumpſit* the plaintiff, doubtleſs, might have recovered; but that he is not, for that reaſon or any other, precluded from recovering by trover: That the property only is neceſſary for trover. If goods are bought, money paid, goods afterwards refuſed to be delivered, action of trover lies, and even action of detinue, which I take it, makes no difference, but that the very goods themſelves only can be recovered in detinue;* and ſo is the authority of *Noy*, that payment of earneſt transfers the property.

* Quære de hoc and vide Reynolds *and* Golightly.

Lord *Mansfield*—I wiſh you may find a *caſe*, Mr. *Cowper*, on which *payment* entitles to *trover:* For ſuch a caſe would be nearly connected with this. We think the *conſcience* of the caſe is entirely on your ſide.

Afterwards, on the fourteenth of *May*, in the ſame term and year, Lord *Mansfield* delivered the *judgment* of the *Court*, to this effect.

This is an action of trover. [And after ſtating the caſe] The queſtion was, not on the *juſtice* of the caſe, but on the nature of the action. You ſee *every* part of the agreement is *performed* by the plaintiff. On the part of the defendant there is a *breach* of contract; but there is likewiſe a *ſpecial injury*, the *detainure* of the veſſel. An action of *detinue* would have been good: An action of *trover* then, which goes on *detainer* and converſion, what will it's effect be? It's laid down by Lord Chief Juſtice *Holt*, that where a man *keeps* what *another* has a *right of property* in, this keeping is a *converſion*, and *tortious.*

If the *caſes* ſtand with this *doctrine*, the point is clear. *And very appily, the more the law is looked into, the more it appears founded in quity, reaſon, and good ſenſe.**

Noy's Maxims, *c.* 42, *page* 86 to 88. If I *ſell* my horſe for mo-ey, I may *keep* him till the money is paid: But if I do preſently ender the money, and it is refuſed, I may take the horſe, or have ny action for the detainment.

Godbolt, 339.

Cumberback, 341, B. *tenders* the money, the *property* is *altered*.

Noy's Maxims. Exchange of an horſe; the earneſt *binds* the argain.‡

We obſerve, that the grounds in fact in this caſe, are very ſtrong: The vender did every thing in his power; we wiſhed to be ſatisfied hat the law was on his ſide; we have conſidered the authorities, nd are very glad to find it *is* ſo.

JUDGMENT FOR THE PLAINTIFF.

Goodright, on Demiſe of Parrack, *againſt* Patch.

LIMITATION to his daughter *C. Parrack*, for life, without impeachment of waſte: And from and after the expiration of hat term, to her ſon and ſons, daughter and daughters, *equally* to e divided; and on default of ſuch ſon and ſons, daughter and aughters, limitation over. Contended, this is an eſtate in *fee*; be-auſe no limitation to reſtrain it: Or if not in fee, then an eſtate-ail. *Son and ſons* are *nomina collectiva*; and though daughter and aughters were not then ſo determined, yet they are within the rea-on.

Here are words correſpondent to thoſe of *body*: The ſon or ſons f C. P. As there were *children*, there could be no default of ſons, the *reſtrained* ſenſe of the term ſons, becauſe a *default* of them infers a *negative* of their coming into *exiſtence*; and by no means ſignifies the ſame as *failure*. But, taking *ſons* to mean *iſſue*, then *default* will have it's proper and uſual import.

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* Lex eſt ſanctio juſta jubens honeſta et prohibens contraria.
Lex eſt ſumma ratio.
Ratio eſt anima legis.
Nulla vetita aut turpia legibus præſumuntur, ſed contraria omnia legitima atque neſta.

‡ Quod arrhabonis loco perſolvitur pactum ligat.

On the other ſide, Though it is probably the general intent of a teſtator, when he gives an eſtate, without particular *limitation*, to paſs an eſtate in fee, yet it muſt appear on ſome circumſtances; or otherwiſe the conſtruction of law will prevail; which makes it an eſtate for life. That if default be taken ſtrictly, then if a child had been born to *Catherine*, the eſtate had veſted in that child: On the death of that child, an infant, the elder brother of *Thomas* would have taken, *contrary* to the *intent*, and the remainder over to *Thomas* not have operated. That the words ſon or ſons, daughter or daughters, of *Catherine* were only a *deſignatio perſonæ*: That the words *lawfully begotten* make no difference: For, Lord *Coke* ſays, every child muſt be of the body. (*Quod nota nam profecto ſi ipſe non dixiſſet opinor in dubium cecidiſſet an ita lex ſentiret neminem ſine parentibus naſci*) But if a man deviſes an eſtate to huſband and wife, and after their death then to their *children*, whatever child or children they ſhall have after ſhall take an entailed eſtate, though there was none at the time. That the evidence of the teſtator's *intent*, in ſuch a caſe as this, to over-rule the operation of law, muſt amount to a moral *certainty*; almoſt a *demonſtration*.

In replication, it was argued, that no *moral* certainty, but ſuch *hints* as could be ſpelt out, explanatory of intention, were the guide the court had been accuſtomed to take in ſuch caſes. The *limitation* being wanted, there is only a deſcription of the perſon, it is ſaid: But *default* of ſuch ſon and ſons, daughter and daughters, poin out *limitation*. Lord *Coke*'s reaſon in *Wilde*'s caſe has been ofte queſtioned.

Lord *Mansfield*—In this caſe, it is difficult to come at the inten of teſtator: *Quod voluit non dixit*. Something has been *omitted*: I is highly probable he meant an eſtate in *fee* or in tail. I really can't find a ground.

We will take a little time to ſee whether we can make any thing of it. As to *default* of ſuch ſon or ſons, daughter or daughters, i would have been *hard* to extend it, if a child had been *born* an *died* immediately.

Mr. Juſtice *Aſton*—It ſeems extraordinary, that he ſhould mak his favourite daughter's children tenants for life, limitation over i fee, to *Thomas*, the ſon of the other daughter.

Lord *Mansfield*—I can make a conjecture, but can't find any thing upon the will. The misfortune is, it is nonſenſe.

28 *Jun*

28 *June.*

Lord *Mansfield*—This caſe ſtands for judgment of the court. One *T. B.* being ſeized in fee of the premiſſes, makes his will. It ap-ears he had two daughters, becauſe he gives them 5 *l.* a-piece by is will. He gives a meſſuage and tenement to his wife; and alſo he eighth part of another, during the term of her life.

After her deceaſe, to truſtees, their heirs and aſſigns for ever, to reſerve contingent remainders, in *truſt*, for *C. Parrack*, his daugh-er, for life; remainder to the ſon or ſons, daughter or daughters of *C.* lawfully to be begotten, equally to be divided among them, if more than one; and for want of ſuch *iſſue*, to his grandſon, *T. Parrack*, his heirs and aſſigns for ever: The reſt and reſidue to his wife.

C. had no children at the time of the will, but three at the time of his deceaſe; a ſon and two daughters. It is not material to ſtate how the parties in ejectment come to claim; as the only queſtion is, whether the deviſe to "*ſon or ſons, daughter or daughters,*" be an eſtate for *life* or of *inheritance?* Now the rule of law is *ſettled*, by analogy from a variety of caſes, that where there are *no* words of *limitation*, general words will operate *no more* than an eſtate for *life* in the deviſee. The ſecond rule *is*, that in *ſuch* caſe, the words *ſhare and ſhare alike, or equally to be divided*, ſhall not enlarge the eſtate; but theſe words ſhall have another legal operation. It has been truly argued from the bar, that the *intent* of the party is *generally counteracted* by this rule; and I believe this to be true: For teſtators generally don't take the difference between a *real* deviſe, and a deviſe of *chattels*; and therefore, the court *will always catch at circumſtances* expreſſing *intent*, though there be no expreſs words. I recollect but one caſe cited at the bar, to ſupport the interpretation of the deviſe, ſo as to give an eſtate of inheritance.

Burr. Rep. 1895. *Oates*, on the demiſe of *Wigfall*, againſt *Brydon.* A woman deviſed her *houſe* to her huſband for life; remainder to her brother for life; and then to *ſeven* perſons, ſhare and ſhare alike; "but if my huſband die before my brother, then my will "is, that it be *divided amongſt* them." The Maſter has *marked* theſe *particular* words as the *ground* of the judgment. The houſe was worth about 100 *l.* the words could not operate to make them tenants in common; for that had been done before: It can't make a diviſion of annual value; and a ſpecific diviſion of the houſe into ſeven parts cannot be put in execution, to the benefit of any of the parties.

There is another caſe, in which the children take a fee. An e tire fee was given to truſtees; the reſt of the rents and profits to divided among them when they attain the age of twenty-one. T court *collected* they were to take the profits proceeding when th attained the age of twenty-one, and alſo a *fee*, becauſe the truſte had one. *Mod. Rep.*

In this caſe, with all the deſire poſſible to ſupport the conjectu I *really* have, that the teſtator did *not* mean to give to *Thomas imm diately* after the *life* of the *ſons* or *daughters* of *C.* I can find n ground. It might have been an *executory deviſe*, with the word " in caſe *C. Parrack* die without *iſſue in my life time*; or, in ca " *the iſſue of her body ſhould die without iſſue in my life time*, then " give over." An implication might have been grounded of con ſiderable weight, but here we muſt raiſe an *implication* upon an *im plication*, which is too much, and too wide.

Serjeant *Burland* cited the caſe of Lord *Hardwicke*, *Goodland* an *Goodwin:* That caſe would be of great importance, if it had bee *fully* or *accurately* reported. I remember, I was in it, but have n note; ſo that I thought certainly, that nothing material came int argument upon it.

Caſe in *Atkins*, year 1746, and in *Vezey*. The only queſtion i ſtated to have been, whether the children *unborn* ſhall take.

In the caſe cited there are *very* material points, if it had been argued: Firſt, that he deviſes his *eſtate*; then farther, the deviſe is t his daughter; and for want of children of her, to his own *righ heirs, ex parte paternâ*, which muſt be after failure of the iſſue o his *own* body, that is to ſay, iſſue of his *daughter*. We can ſee no ground here to conſider the deviſe as more than a deviſe for *life*. The conſequence is, JUDGMENT for the DEFENDANT.

The deſcribing of the meſſuage by it's particular *locality*, was relied on by his Lordſhip as one of the reaſons of his judgment.

Attachment.

If time of exception is out, you can't juſtify after the expiration of the time, if you have not before; but you may avail yourſelf, to ſtop an attachment againſt the ſheriff.

Bail.

EXAMINATIONS of bail, Lord *Mansfield* obſerved, were grown to ſuch an extent, that the court muſt ſtop them.

Indemnity to the Sheriff.

Martin *againſt* Wenman. *In the Caſe of Mr.* Wenman *and others.*

AN indemnity entered into for a year, as a ſecurity for the ſheriff, and his officer. The defendant gives this indemnity, with ſureties, to the under ſheriff.

Afterwards, the defendant gives notice that he does not mean to ſtand by his indemnity; and this notice is left at the under clerk's of the under ſheriff.

On the firſt complexion of the affair, Lord *Mansfield* expreſſed himſelf *ſtrongly* againſt this notice *diſcharging* the *obligation.* What is the effect? Can it diſcharge ſuch a man's indemnity? Certainly not. It might have affected the principal in *conſcience*, if the notice had been to the principal himſelf; but given to an agent, how is it to operate? *It cannot affect the principal farther than the agent is an agent in courſe of buſineſs.* If this giving up of the ſecurity had been in the courſe of buſineſs, it would have been good by the hands of the agent; but being no notice to him, *qua* agent, it cannot poſſibly reach the principal: And if they will do any thing, they muſt bring their action, if it can be maintained any where, againſt the man to whom they ſent the notice.

Mr. Juſtice *Willes* ſaid, that he ſhould ſpeak with great diffidence, and be always diffident of himſelf, whenever his opinion differed from the practice of the conrt. But that on the particular circumſtances, he thought it might lie open to a new mode of examination, Mr. *Dunning* having offered to put the money into their hands.

That on the principle of law, he thought the indemnity ſtood till the ſheriff's year was out. Eſpecially, that Mr. *Wenman* cannot demand a diſcharge without the concurrence of the reſt. But that as the under ſheriffs did not attend at the office, they were liable for their agent's neglect.

Suppoſe the ſecurities had come all together, and ſaid, we greatly diſapprove *Bolland*, your officer; we muſt deſire you would deliver no more warrants to him: Suppoſe the under ſheriffs had promiſed

3 M

that they would not; would a jury, on an action for damages, not charge the ſheriffs?

And what is done here? Why, they apply to the agent, who does not deny the notice, but only ſays, he does not remember any written notice, and believes the notice was not given till after the warrant ſerved.

Mr. Juſtice *Aſhhurſt* doubted the ſtrength of the facts to ſupport the motion; and doubted the principle of law, whether the ſheriffs would have been chargeable, if the notice had been to them perſonally: Much more when to their *agent only*, out of the ordinary way of buſineſs.

Lord *Mansfield*—I have *no* doubt, if they had ſaid, they would grant *no* warrants the ſheriffs could *never* have *recovered damages* in point of *law*. But whether the *undertaking* of *Frith*, the agent, would have *bound them, does not appear* to me by any means *clear*. However, though there were three perſons preſent, only *Wenman* knows any thing of it, who cannot be a witneſs on the trial.*

The court at laſt determined to admit *Frith* to make a ſuppletory affidavit, as to what he knew about the warrant.

Rule enlarged.

Lord *Mansfield*—Let the writs be produced, and the accounts delivered to *Wenman*; and let *Frith* anſwer more fully as to the notice.

Indemnification endorſed on the writ by plaintiff's attorney.

Afterwards, on the fifteenth of *May*, *Frith*'s affidavit, according to the terms of the enlarged rule, was read, "That, to the beſt of "his recollection and belief, the warrant granted to *James Bolland*, "18 *Jan.* 1771, was delivered out after the notice of the defen-"dants: That he is further confirmed in his belief, by an indem-"nification endorſed on the writ, by virtue of which the warrant "iſſued."

Lord *Mansfield*—It comes out very clearly now; and Mr. *Frith* would have done well if he had diſcloſed this on his former affidavit: As I am ſatisfied he had it in his mind then. The idea of the accounts was, to ſee whether the day and the particular action on which the loſs happened, had been ſtated: It appears clearly *not*.

The counſel for the defendant moved on this, that the ſum of 360*l.* on which judgment had iſſued, and execution had been levied, ght be returned to the defendants; which, I believe, was the ori- al motion.

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* Neminem oportet teſtem eſſe in cauſa ſui privata.

Lord *Manſfield*—If we grant this rule, we ſhall determine the eſtion in a *ſummary* way: For the queſtion is *ſtill*, whether they, e ſheriffs, are liable for the act of *Frith*?

Mr. *Dunning*—Yes, my Lord; I ſay the ſheriffs take an indem- y, to prevent their being prejudiced by conſequences.

Lord *Manſfield*—This is *very ſtrong* on the *indemnity* taken by e ſheriffs. I apprehend, however, the ſheriffs, in an action againſt em, may have a remedy over, either againſt *Frith*, as diſcharging e ſtanding ſecurity, or againſt the plaintiff's attorney, upon the demnification. *And we would not, by a ſummary proceeding, obſtruct ſe remedies.*

If this goes there will be an immenſe circuity.* *Martin* comes ainſt *Frith*, *Frith* againſt *Priddle*. (The plaintiff's attorney.) I ink it would be proper to enlarge the rule farther. *Frith* ſhould ew cauſe why *he* ſhould not be anſwerable to the *ſheriffs*; and *riddle* both to them and *Frith*.

Lord *Manſfield* took notice, that they had not brought in this ſe the proper parties before the court: But that they might make *rith* and *Priddle* parties to another rule: And that it was to be nſidered, whether *Priddle* was not underſtood as the ſole ſecurity. hat the rule ſhould be ſuſpended; and might be drawn for a very ort day. His Lordſhip thought, that they could have nothing to nſwer to it, and that the ſheriffs would be entitled to recover.

RULE ENLARGED, and *Frith* and *Priddle* to anſwer why they ould not indemnify the ſheriffs, as to 360*l.* and proportionable oundage.

Lord *Manſfield* aſked, in what capacity *Frith* acted?

It was anſwered, as an under clerk.

Lord *Manſfield*—Is it uſual for *under clerks* to take indemnities?

A gentleman in court ſaid he had been an under ſheriff for many ears, and never knew it.

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* Note a circumſtance of this caſe, which, I think, appears by the affidavits, hat when the ſheriff came upon *Wenman*, he deſired they would ſue *Lewin* firſt, nother of the ſureties, which they did. *Lewin* complained, and *Wenman* gave im an indemnity, on payment of 400*l.*

Serjeant *Davy* ſaid, it was *cuſtomary* in *Devon*, and they had no other way.

I find no more of this caſe; but I take it, that the court appear to have decided on it: That an agent of the under ſheriff, as clerk, cannot bind the ſheriff or under ſheriff to matters not properly within his buſineſs.

Vide Wood's Inſt. 55, 56.

That when a perſon becomes ſurety for a year, with others, he can't diſcharge the indemnity given to the ſheriff without the conſent of the ſheriff, and of the other ſureties.

That if the under ſheriff, in this caſe, had taken notice of what had been ſaid to *Frith*, and had ſaid, he would deliver no more warrants to *Bolland*, *Wenman* declaring, if he did, he would not ſtand to his indemnity, the under ſheriff, in ſuch caſe, would not have been entitled to recover damages in this action.

Lex non amat circuitum. Boni judicis eſt lites dirimere.

Note too, the pains taken by the court to avoid circuity of action.

Plea of Coverture.

WHETHER neceſſary, where a *feme covert* is arreſted; or whether ſhe ſhall be diſcharged ſummarily upon motion?

This was in a caſe in which Mrs. *Baddeley* had been arreſted, and applied to be diſcharged on motion, and a copy of the regiſter of the marriage, accompanied with an affidavit that her huſband was ſtill living.

Mr. Juſtice *Aſton* ſaid, that he had learned from one of the judges of the Common Pleas, that in three caſes cited in a queſtion there, it was held in great doubt, whether a copy of the regiſter was ſufficient; becauſe the wife, perhaps, lived ſeparately from her huſband.

Mr. *Murphy*, the counſel in the cauſe, was deſired to enquire into the caſe in the Common Pleas.

Indictment.

In Arreſt of Judgment.

OBJECTION to an indictment, that the *time* of the offence charged is not ſpecified.

The indictment was for words ſpoken of a Juſtice of Peace, in e execution of his office. The words were, "You did not do juſtice." It's charged in the indictment, that the words were oken at the petty ſeſſions holden for *Weſtminſter*.

Indictment that before and after the ſixth of June, the proſecutor was a Juſtice of Peace: And that at the petty ſeſſions held at Weſtminſter, the defendant then and there ſpoke, &c. bad.

It was argued againſt the motion, that the time and place was fficiently ſtated by collection from the whole indictment: For firſt, at the indictment ſets forth, that on the ſixth of *June W.B.* was Juſtice of Peace; then, in the clauſe in queſtion, that at the petty ſſions holden for *Weſtminſter*, *then* and there defendant ſpoke, &c.

That in this offence ſo much ſtrictneſs is not neceſſary as in a caital queſtion; that even in capital caſes *adtunc et ibidem* ſhall refer the time mentioned firſt in the indictment, without repetition.

Farther, it was argued to what other time it could refer. Lord *Hale* ſays, that even in capital caſes, the degree of ſtrictneſs required indictments is the diſeaſe and reproach of the law, and calls for emedy.

ab abſurdo.

ab inconvenienti.

That the reaſon aſſigned why the Time muſt be ſo particularly tated is, that the *forfeiture* may relate accordingly; and that caſe of murder it may appear, whether the death was within the ear and the day; that this reaſon did not apply to this caſe.

ex artificialibus.

a diſſimili.

That even where it might apply, it did not hold in practice; or that a man might be indicted for having given the wound in 770, and the death might be proved in 1769 ſufficiently for coniction.

A non-uſu.

Vide 2 Hale, Plac. Cor. c. 25. p. 179. Emlyn's edit.

Mr. Serjeant *Hawkins*, *Plac. Cor.* was cited.

Mr. Serjeant *Davy* ſaid, that he ſhould not cite either *Hale* or erjeant *Hawkins*; he hoped in ſuch a caſe as this, a few words rom Serjeant *Davy* would be ſufficient. That if the *then* could e preferred to *one* time only, he admitted the once mentioning f the time was ſufficient. That here nobody could tell the time this caſe; that the indictment ſet forth that *before and after* the th of *June* Mr. *B.* was a juſtice, &c. and that at the petty ſeſſions holden for *Weſtminſter*, *then* and there the defendant ſpoke, c. Whether the *then* referred to *all*, *any*, or *what time* he could ot tell; perhaps he regarded all times that ever were or ſhall be; e fancied the court would not help the indictment, by gueſſing hat time, or by referring it to all.

Cui curia aſſenſit.

And JUDGMENT was accordingly ARRESTED thereupon.

New Trial.

Rule.

Lord Mansfield.

NEVER take a rule for a new trial, without ſpecial order of the court beyond four days. *

Langfielde, on Demiſe of Banton, *againſt* Hodges, Copyholder.

In Ejectment.

Equitable preſumption rebutted by parol evidence.

BY the cuſtom of the manor, copyholds were held upon lives.

A perſon who was tenant of certain copyhold lands in the manor, according to the cuſtom, put in the name of the leſſor of the plaintiff, who was his *nephew*, with his own.

Queſtion, Whether the putting in his name ſhould be conſidered as an advancement in conſideration of blood and natural affection, or only make this nephew a truſtee.

It was, I think, admitted, that the *equitable preſumption* was, that he took *only* as *truſtee*; but to repel this preſumption, *parol* evidence was offered that he afterwards ſaid—" *I give it him.*"

Vide Lamplugh *and* Lamplugh, 1 Peere Williams, term Mich. 1709. p. 111. and the caſe following it, and the caſe following of Lady Dowager Granville. Vide Ducheſs Dowager of Beaufort.

Lord *Mansfield* thought, that as the nephew was *in* of the *legal* eſtate *before* theſe words, " *I give it him,*" they were *proper evidence* to be left to the jury of the *intent* upon the *original* taking, and lead *naturally* to *interpret* it. And that wherever a *legal eſtate* is *taken away* by *equitable preſumption*, you may *always rebut* by *parol* evidence.

Part of the evidence went to prove, that he had *purchaſed* with an *intent* to give it to his *nephew*.

The *adminiſtrator* of the uncle claimed on the other ſide.

Lord *Mansfield* ſaid, he thought the *adminiſtrator*'s claim in equity was *very queſtionable*; and that he never heard of ſuch a caſe.

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* Nulli negabimus aut *differemus* juſtitiam vel rectum, Ma. Char.

It was ſaid, however to have been determined in a caſe of —— erſ. *Crew*, 1 *Peere Williams.*

Note, This caſe I do not find: But there is a caſe of *Philips* verſ. *Philips, termino paſchæ* 1701. reported in *Peere Williams,* where it was determined in *communi banco,* that an eſtate *par auter vie,* ſhould go to the adminiſtrator (by the ſtatute of 29 *Car.* 2. *c.* 3. *ſ.* 12.) where there was no executor.

Lord *Mansfield* obſerved, that in the caſe of *Selwyn* verſ. *Browne,* ord *Talbot* went on the reſiduary deviſe, and that *parol* evidence ould not be admitted there, becauſe it would have *contradicted,* not *xplained* the deviſe. Lord *Hardwicke* thought the reſiduary deviſe ot ſufficiently clear, and ſuſpected fraud; neither decreed in that aſe on the ground of equitable preſumption, not to be rebutted by arol evidence.

That in the particular caſe where a man gives his executor five ounds perſonally for his trouble, it was decided he made him a ruſtee; and that upon the *particular* circumſtances of that caſe, the rgument of *equitable preſumption* had been carried into *general* application *much too largely.*

It was ſaid afterwards, that the parol evidence in *Selwyn* and *Browne* was to *raiſe* the equity, and not *rebut* it; and his Lordſhip eemed to concur in that opinion.

14 *May* 1773. Lord *Mansfield* ſtated the caſe. That it appeared in evidence that the inteſtate gave 600 *l.* for the eſtate juſt before his death: That he had ſaid he *intended* it *Langfielde* [his nephew] after his death, and would *give it* him: That at another time he aid he had purchaſed it for him.

He had been dead nine years—it did not appear when the plaintiff entered. And it was argued,

1ſt, Whether parol evidence was good or admiſſible at all in this caſe?

2d, Whether to rebut the equitable preſumption?

3d, Whether, if parol evidence could be admitted, and might rebut an equitable preſumption, the evidence in this caſe was ſufficient to that purpoſe?

As to another point, whether a new admittance neceſſary, on all hands, that where there are remainders over, the firſt admittance is ſufficient to ground an ejectment. That a man ſhall *never* be *non-ſuited* by a *legal* eſtate in his *own truſtee*.

It was contended, that by general preſumption, where a man *purchaſes* a copyhold, and *pays* the *fine*, the purchaſe-money going in *diminution* of his *perſonal* eſtate, that there is, therefore, a *reſulting truſt* to the executor or adminiſtrator.

The adminiſtrator cannot hold the eſtate, if the inteſtate has given it over to another; nor can he defeat the eſtate of that other.

Renewal of Leaſe, with ſeveral eſtate for life, by cuſtom of the manor; the firſt taker cannot by ſurrender bar the ſucceſſion: [Perhaps conſidering him as a truſtee for the remainders, vide *Manſel* and *Manſel*, 2 *Peere Williams*.]

It is ſaid, it's not within the Statute of Frauds; becauſe there is an eſtate by legal implication only, and that this will not do againſt the equitable preſumption. I am clear there may be a rebuttal by parol evidence.

In Equity Caſes abridged, this rebutter is ſet up to ſupport a truſt againſt *equitable implication*. There was a ſon, and yet they admitted a rebuttal to prove a truſt. As to the evidence, it appears to me clear *quo intuitu*, the firſt ſtep was taken, if a man merely ſays, I *give*, or *intend to give*, this, to be ſure, paſſes nothing; becauſe the intent is not legally executed: 'Tis a rule.* But here he purchaſed; he put in his nephew's name; his nephew was admitted; he intended it for his nephew ('tis ſaid in evidence) after his death; from the purchaſe to the laſt minute of his life, he declared his intention. WE ALL AGREE: And the CONSEQUENCE is, that the plaintiff has both the *legal* and *equitable* eſtate.

* Vide Brett *and* Rigden.

JUDGMENT FOR THE PLAINTIFF.

His Lordſhip obſerved, that an equitable preſumption was only a kind of *arbitrary implication* raiſed, to ſtand only till ſome *reaſonable proof* brought to the contrary.

Holloway, Parſon of Swallowfield, *againſt* Hewit.

For a new Trial.

ACTION againſt defendant for non-payment of tithes.

Plaintiff alledged cutting down clover graſs and making it into hay, and carrying it off, without having firſt ſet out the tithes, which by right ought to have been ſet out for the plaintiff, according to immemorial uſage, &c.

Vide of tithes commentar. b. 2. c. 3. 18 E. 3. ſt. 3. c. 7. 45 Ed. 3. c. 3. 1 R. 2. c. 13. 5 H. 4. c. 11. 7 H. 4. c. 6. 27 H. 8. c. 20. 32 H. 8. c. 7. 27 H. 8. c. 21. 37 H. 8. c. 12. 2 & 3 Ed. 6. c. 13. ſ. 12. 31 H. 8. c. 13. ſ. 1. 22 & 23 C. 2. c. 15. 3 W. & M. c. 3. 11 & 12 W. 3. c. 16. 1 G. 1. ſt. 2. c. 26. ſ. 2. Juſtices of Peace empowered to give remedy for ſmall tithes, 7 & 8 W. 3. c. 6. 4 Ann. c. 27.

Witneſs called, who ſaid it was the cuſtom to make the clover graſs into hay-cocks before they ſet out the tithes, and that they uſed to pay in kind.

Another witneſs ſays, he believes they uſed to pay tithe in kind for every tenth cock.

Another ſays, that for twenty years back they took tithe in kind.

Another ſwears to fifty years back.

Another that he lived ever ſince the hard winter at *Swallowfield*, that they uſed then to take tithe in kind.

Another, I think ſaid, that he had lived twenty-five years at *Swallowfield*, that the general cuſtom was to make into hay, and then ſet out the tithes before they carried: That at firſt he *paid*; but after they took the tithes in kind.

Another, that for eighteen years it has always been taken in *kind*, but that before it uſed to be *paid* for: However, thirty years ago, he ſays it uſed to be taken in *kind*.

Evidence for defendant—A witneſs, who ſays he was ſervant to young *Ellis*, who was then the farmer of the tithes; that about eighteen years ago, a diſpute aroſe about the payment. Mr. *Ellis* looked into the articles, and ſaid he muſt ſet out the tithes, for elſe it would make a bad cuſtom; that if they found any would *not* ſet out, they muſt make agreement.

Another witneſs—That after he left the pariſh, it was not the reputation of the pariſh that tithes were to be paid in kind.

Several witneſſes for the plaintiff ſpoke of this *Ellis* and of the cuſtom as before ſtated on the part of the plaintiff.

The jury found for the defendant.

The balance of the evidence appeared extremely ſtrong on the part of the plaintiff; there were but two evidences in all, ſuch as they were, on the part of the defendant.

It was objected, that on a penal ſtatute, eſpecially when the party came in for trifling damages vexatiouſly, it was contended, that the verdict ſhould not be diſturbed by a new trial—unleſs prevarication appeared, or tampering with the jury.

Jarvis qui tam againſt *Hall*, on the Game Act—for killing an hare. *Wilſon*'s Rep. Lord Chief Juſtice *Lee* ſaid, that he did not remember that ever a new trial was granted on a penal action.

The King *and* Buck. Str. 679.

Lord *Mansfield*—*Never on ſuch a penal action to be ſure.* [For in *Strange*'s Reports on a *qui tam* action for killing an hare, determined that an indictment will not lie; a ſummary mode of proceeding before the juſtices having been provided by the ſtatute.]

Vide Salkeld 644. Smith *and* Frampton.

Raymond's Reports. *Smith*—For loſs of the plaintiff's houſe by defendant's negligently keeping of his fine. Verdict for the defendant. Lord *Holt* was diſſatisfied; yet the court would not grant a new trial.

Verdict againſt form, but according to juſtice of the caſe, not to be diſturbed, vide Salkeld 646.

Lord *Mansfield*—This was not a penal action; and I myſelf ſhould have refuſed a new trial in that caſe: 'Twas a very hard one, and defendant loſt his own houſe by it. And where a verdict is againſt the *form* of law, but according to the *juſtice* of the caſe, as in the Ducheſs of *Mazarine*'s Caſe, the court will not unſettle the verdict.]

And farther, on the Statute of *Uſury*, on a motion for a new trial, it was adjudged by the counſel, that the court would not even grant a rule to ſhew cauſe.

Lord *Mansfield*—What do you think upon a *bond*, if a wrong verdict for defendant?

My Lord, I don't apprehend that to be a penal action. Execution cannot be taken out for the penalty, but only for the value of the bond.

Lord *Mansfield*—The doctrine is *right*,* but is not *applicable*: Theſe are all proſecutions by common informers. This is a queſtion of right, almoſt the only action on which it can be tried by the common law; 'tis a moſt beneficial way for the defendant of trying the title. The jury don't give the damages; they are never directed. You might as well ſay, where there are *double coſts*, there ſhall not be a new trial.

RULE ABSOLUTE FOR A NEW TRIAL.

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* Namely—Nemo bis in diſcrimen veniet pro eodem delicto.

ON an action for aſſault and battery, and falſe impriſonment; tried at the *Saliſbury* aſſizes before Mr. Juſtice *Blackſtone*.

Brookſhaw *againſt* Hopkins.

TO ſet aſide judgment of Nonſuit, and be at liberty to proceed to a new trial.

Action charges that the plaintiff laid hands on the defendant vio-ntly and beat him, and bound him with fetters, and confined him a private mad-houſe.

Plea not guilty.—Special juſtification, that he is a juſtice of peace, nd did it in execution of his office, [the perſon being mad.]

Vide 21 J. c. 12.

On the part of the plaintiff this was denied to have been done in xecution of his office.

Vide 34 E. 3. c. 1.

It was, by Juſtice *Blackſtone* held, that whatever irregularity, yet t was by *colour of office*, and therefore *nonſuited* the plaintiff.

Mr. *Dunning* in ſupport of the motion—That if there ever was a oſſibility of magiſtrates being reſponſible for private aſſaults, he hould imagine this was one of thoſe caſes of reſponſibility. And hat as to the former acts, at leaſt of thoſe complained againſt, he cted not in the execution of his office; nor within his juriſdiction. That as to the quantity of damages that might, or ought to be recovered, the court would not look into that, as it certainly belonged to another tribunal.

The *Norwich* Caſe was ſtated—Lord *Mansfield* ſaid it aroſe from the officer's executing the warrant improperly; taking up in the city, when he ſhould have taken up in the county. On another cited by Mr. *Dunning*, Lord *Mansfield* obſerved, the order was to take up lewd women, and he took up a modeſt woman.

Mr. *Wigmore*, on the ſame ſide with Mr. *Dunning*—That there was no warrant from the juſtice to take up the man; and though not denied, that if a man be furiouſly mad, the juſtice, without warrant, may detain him; this muſt be on the merits and evidence of the fact, and requires being tried by the country.

That there is no pretence here that it was upon information: That in caſes of this ſort, for a juſtice of peace to juſtify his proceeding, there ought to be ſomething in writing.

* Vide Sir James Burrow's Rep. p. 1761. the caſe alluded to is Lawſon or Dawſon *and* Clark, and p. 1767.

That the two caſes mentioned by Mr. *Dunning*, are on the argument of *Money* and *Leach*, * and that his Lordſhip ſaid there, that there were many other caſes, in which the act done might not be within the juriſdiction, ſo as to entitle the juſtice to the benefit of the ſtatute. And that Mr. Juſtice *Blackſtone* had declared, that he thought the leaſt colour of juriſdiction ſufficient; and, at the ſame time, as a reaſon why the nonſuit would not prejudice them, that they would be at liberty to try whether it ought to have been granted.

Lord *Mansfield*—I dare ſay Mr. *Wigmore* has not lately looked into the caſe [to which he referred] becauſe it turned on how far the conſtable was authorized as a miniſterial officer. For in ſome caſes, the *warrant* is a *juſtification* to the officer, though the act of the juſtice be not according to law, as to what it may command.

There may certainly be a material diſtinction as to the act; if he ſtruck the firſt man he met, he does not do it within his juriſdiction. *

Mr. Juſtice *Aſton*—It appears it was done, perhaps, in favour of the plaintiff to prevent miſchief; and in that caſe, though not in execution of his office, perhaps it may ſtand.

Of pleading the general iſſue, and giving the ſpecial matter in evidence, vide 7 J. 1. c. 5. 21 J. 1. c. 12. vide Burn, 2d vol. tit. Juſtices of the Peace, ſ. 6. et alibi.

Lord *Mansfield*—As this has never been before the *jury*, but comes on the judges *nonſuit*, I doubt we muſt go on the *ſtrict point of law*.

Irregularity.

MOTION to ſet aſide proceedings for irregularity, the attorney's name not having been endorſed on the writ.

On its appearing, however, that there had been ſomething done ſince on the other ſide to continue the cauſe, notwithſtanding this irregularity.

RULE DISCHARGED—but, I think, *without coſts*.

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* Lex neminem ad male—faciendum hortatur; neque licentiam ulli, peccandi facit.

Bail.

Rule.

BAIL in the name of *one* of the plaintiffs only, where there are *joint* plaintiffs to the action, are *no bail*. Regula.

The notice was *right*, they had proceeded as far as demurrer.

The maſter ſaid there was *no cauſe in court*, for want of the names f *both* the plaintiffs; * if the parties were in court, they might *waive* e exception by proceeding.

Lord *Mansfield* ſaid he would ſtay proceedings till rectifying of e bail.

Rule taken to give judgment as of this term; try the writings ſter term; and rectify the bail—*by conſent*.

Common Appearance.

ON a common appearance proceeding to plead, admits regularity of the appearance.

Eſtate *pur auter vie*.

IF there be eſtate to *B. durante vita, A.* and grantee dies in life of *ceſtuy que vie*, and a ſtranger entereth as general occupant, e ſhall be admitted, and pay the fine. *Coke Copyhold* 62.

Eſtate *pur auter vie* of copyhold granted to one and his heirs; eir entereth as *ſpecial occupant*. Where by cuſtom the copyhold ight be *extended*, party ſhall be admitted on the extent, paying e fine. *Ditto.*

29 *Car.* 2. *c.* 3. Eſtate *pur auter vie* ſhall go to executors or adiniſtrators, where there is no deviſe or ſpecial occupant thereof.

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* De non apparentibus et non exiſtentibus eadem eſt ratio.
Quod ab initio non valuit tractu temporis, &c.

Bail.

15 May.

BAIL in error cannot ſurrender the principal; but muſt pay the money if judgment is affirmed.

The King *againſt* The Inhabitants of the Weſt Riding of *Yorkſhire*, for neglecting to Repair.

LORD *Manſfield*—You can't come here, the indictment not here: If we give an *opinion*, we can't give a *judgment:* You can't come here for an *opinion* to *us*; they ſhould come to *you.* But, I don't ſee why by conſent you may not move it for the furtherance of juſtice.

They moved accordingly.

The indictment was for not repairing a bridge, and two hundred feet of highway, which they had been uſed to repair.

They pleaded guilty for the bridge, and twenty-four feet eaſt, and twenty-one feet weſt.

Not guilty for the reſt.

Queſtion 1ſt, Whether defendants *primâ facie* liable by ſtatute?

Or 2d, Whether by common law?

That *primâ facie* the pariſh is liable to repair; and ſo by common law.

If the inhabitants of the Weſt Riding at large are liable by ſtatute, this liability ſhould be ſtated on the indictment.

That there is no way of ſhewing them guilty on this indictment but by common law, or immemorial uſage.

That the ſtatute 22 *H.* 8. *c.* 5. gives power to juſtices of the peace in every ſhire, *&c.* or any four of them, to hear and determine in general ſeſſions annoyances of bridges.

And that whereas in many parts of the kingdom it cannot be proved what hundred, *&c.* town or pariſh is liable to the repair, by reaſon whereof ſuch bridges lie often long without repair, to the great annoyance of the king's ſubjects: Therefore it provides, that where it cannot be *known* and proved what hundred, *&c.* town or *pariſh* is liable, the ſhire or riding, (and as to the other caſes pro-ided for by the ſtatute) ſhall be liable: But ſtill, if it can be *known* nd *proved*, that ſuch a *pariſh* is liable, it remains charged as be- ore the ſtatute, and that in ſuch caſe, they are not to come againſt he Riding.

And that the power given to the juſtices was not meant to take away he ſuperintending power of the king's court at *Weſtminſter*.

Lord *Coke*, in his reading on this ſtatute, ſays, this court or court f Eyre, or court of Aſſize, or ſheriff's tourn, were the only ourts impowered by law to hear and determine.

A lection. juriſprudent. 2 Inſt. 6 & 7. to 706.

The firſt clauſe of the act impowers the juſtices of the ſhire, or four f them, one of whom to be of the quorum, to hear and determine.

That the ſtatute of 2 *Ph.* & *M.* gives them the ſame power.

That all the learned judges ſince had recognized what was before held by the common law, that *primâ facie*, the pariſh is liable, as well for three thouſand feet, as three hundred.

That the clauſe, on which it is ſuppoſed the queſtion is meant to turn, is, that it would be more convenient to have the repair of roads 300 feet from bridges, determined in the quarter ſeſſions. To be ſure, becauſe the quarter ſeſſions ſit four times a year; and therefore, it goes on, that foraſmuch as if ſpeedy remedy be not had, the inhabitants would have little avail, *be it enacted*, that the bridges and highways within 300 feet be repaired and maintained, whenever need ſhall require. Will not this be ſufficiently ſatisfied by giving the juſtices authority to compel the repairing?

The law lays it upon the pariſh: The indictment ſtates, that this road lies in the pariſh of *Selburgh*. The court will never ſuppoſe, that an *immemorial* duty, *altering* the common law, can have ariſen ſince the ſtatute of *H.* 8. and yet that they will be bound to prove an immemorial duty, by what they have laid in the indictment. That the ſtatute *does not*, in this particular, *alter* the common law: That at leaſt, the ſtatute does not extend to this court, or the court of *aſſize*: That the court will take it at common law, *even* for *that* reaſon, without looking farther.

Lord *Mansfield*—That it was argued extremely well, whether the act is not *declaratory* of the common law: It appears it *is*.

Opinion of the court.

When it does *not* appear *who* ought to repair, *then* it is certain that in ſuch caſe, at common law, it is on the inhabitants of the *county*; when the road extends 300 feet from the bridges, it ſhall end.

That the act ſeems declaratory of the common law.

The repair at common law is on the county, when it does not appear who ought to repair.

That the ſtatute does not alter the juriſdiction of the court.

That the ſtatute does not alter the power of this court at common law, but only gives a power to the quarter ſeſſions.

Brookſhaw *againſt* Hopkins.

ON the motion above, for a rule to diſcharge a nonſuit.

Argued againſt the motion, that the defendant was Mayor of *Shrewſbury*, and, by conſequence, Juſtice of the Peace, by virtue of his office.

That if the merits could be gone into, the defendant had behaved with the greateſt civility.

That one *Langton* complained of ſome ill behaviour of the plaintiff.

That the plaintiff terrified *Langton*'s wife, who was with child, exceedingly.

That the defendant ſent expreſſes to the relations, who took the plaintiff, and confined him in a mad houſe for ſix months.

Nonſuit of the plaintiff, for default of notice; and alſo for that the plaintiff did not bring his action within ſix months.

It was ſaid, that as to the neceſſity of a complaint in writing, the meaning of the ſtatute was, that the juſtice might not be compelled to give evidence of a complaint or information, which he did not keep in his memory for ever.

That though proper, prudent, and generally right, to have an information in writing, yet, *the time being elapſed*, he was not bound to ſhew in evidence by what authority he acted.

Juſtice may commit for breach of the peace in his view, without warrant or information.

That for a manifeſt breach of the peace, in his *view*, the commitment was good, though *without* warrant.

Even had it been the caſe of ſettlement of a pauper, payment of tithes, or any caſe where the juſtice acts under a particular power, he ſhall not be forced to ſhew his authority, after ſuch diſtance of time.

Lord *Mansfield*—I ſhall read the report.

An action of falſe impriſonment and binding in fetters: There is another count for a common aſſault; damages laid at 5000*l*.

Caſe ſtated, that the plaintiff was at that time perfectly in his ſenſes, a gentleman of large fortune.

On the part of the defendant a witneſs produced, who ſaid he ſaw him behaving very angrily at *Langton*'s, becauſe he was not let in; threatened Mrs. *Langton* very much; behaved very furiouſly; But he could not ſay he was out of his ſenſes.

That he afterwards inſiſted on going to the races at *Stamford*; that Mr. *Hopkins* endeavoured to perſuade him not: That at laſt, on his growing very angry, and ſtill inſiſting that he would go, Mr. *Hopkins*, the mayor, defendant in the cauſe, ordered the conſtable and the ſerjeant to ſeize and carry him to gaol; which was done. Another witneſs, the conſtable, ſays, the ſerjeant gave him orders to ſeize the plaintiff at *Langton*'s houſe, and bring him before the juſtices. Here is a defect; it does not appear *by what authority* the town ſerjeant did this.

No part of this evidence affected the other defendant.

The plaintiff endeavoured to prove a continuation of this impriſonment, by his friends.

One of the witneſſes ſaid, he would not have taken the man to gaol [I think this was the conſtable] if *Hopkins* had not been mayor.

Hopkins had nothing to do with what was done by the relations of the plaintiff, and does not appear to have known what they did.

The *great* defect in the evidence is, that it does not *appear* whether *Hopkins* committed the man on complaint of *Langton*, or on his *own view*.

On the other ſide, they denied his having done what he did *purſuant* to, and in *execution* of his *office*.

There has been no propoſal to an *agreement* on the part of the plaintiff, which any gentleman here is authorized to make. I don't explain the reaſon; there is a defect of evidence, which I don't chooſe to enter upon at preſent.

I wanted

I wanted to know, whether the plaintiff would have *accepted* the *nonſuit*, if the juſtice *waives* the *coſts* of the *nonſuit*, which, in the caſe of a *juſtice* of peace, is *double* coſts.

I am perſuaded, whether *Hopkins* was guilty or not, of irregularity, or no, he did not intend any harm, but rather kindly to the plaintiff.

Mr. *Dunning*—I don't wonder your Lordſhip's preſent opinion, from the ſtate of the evidence at preſent, as to the innocence, or, perhaps, good intentions, of the defendant; but I conceive the preſent imperfect ſtate in which the evidence appears, is what the plaintiff complains—the ſtopping of the matter in it's preſent ſtate, is the very ground of his diſſatisfaction. But it *might* appear in his *favour*; he conceives at leaſt it *would*.

I differ in part in opinion from the learned judge who tried the cauſe. He thinks, that *colour* of *office* is ſufficient; I think, that acting in *purſuance* of office *legally*, is *neceſſary:* I do not *know* what elſe is acting in *execution* of office.

But a *ſtrange* but *ſtrong* caſe, that the court of Common Pleas, having *no* juriſdiction in *criminal* caſes, ſhould iſſue a writ for the *execution* of a *man*. They would *act* as a *court certainly*; and they have a *power* to *iſſue writs:* Yet, they would *not act within their juriſdiction*, or be *protected by it*.

Suppoſe *this* court, without *any proceſs* before them, ſhould *order* the *execution* of a *man*; this would be under *colour* of *office*; but *not* in *execution*.

Is there any thing done by the plaintiff that could amount to a breach of the peace? As to the defendant, he acted *being a juſtice*; but, as far as I can ſee, *not as one*.

I ſubmit, that it will be neceſſary to go farther into the caſe.

I apprehend, that in the caſe of *Money* and *Leach*, the ground on which the court went was, that there *was* an acting by *colour* of office; but not in *legal purſuance* of that office.

[Lord *Mansfield*—You are very right, Mr. *Dunning*; and I thought ſo yeſterday, from memory.]

I ſhall hope that the court will think a farther enquiry into this buſineſs is *neceſſary:* On which the court will *judge for* or *againſt* the conduct of the defendant, as ſhall appear on a fuller view.

Mr. *Gee*—That they had not been let to proceed far enough; d that nothing was to be proved ſtrong enough to amount to a each of the peace: That they had evidence to have gone into ainſt the other defendant.

Being aſked, why they did not come againſt him, as not being opped by the objection in favour of *Hopkins*? it was anſwered, at he alſo was a magiſtrate. It was aſked why, when the judge id there appeared nothing againſt the other defendant; but I don't now what was anſwered.

Lord *Mansfield*—The queſtion is of *conſequence*, as for the *proction* of a *juſtice of peace*, by conſtruction of the ſtatute: It is *alſo* *conſequence*, becauſe it will be *final* againſt the plaintiff; for if we ronounce, that, on the evidence, the juſtice *acted* in *execution* of s office, then the plaintiff is too *late*, being *beyond* the ſix months.

I own the *great* difficulty is, that I cannot decide upon the evience, whether he committed upon *complaint* of *Langton*, or upon is *own view* of his behaving furiouſly; or upon his inſiſting to ave his horſe to go to the races. *To be ſure, the act does not protect ſtices for an act done by* PRETENCE of office: But where an act is one *unformally*, where, in another manner, it might have been *gally* done, there, in conſideration that *country gentlemen* are *geneally* in the office that have *no emolument*, at leaſt the *beſt* of them, herefore, if they do what by *law* they are *impowered* to do, and *ight* have done another way, the act *protects* them from ſuffering or the *mere* informality.

On *complaint*, a juſtice may *commit*; but in ſtrict form, the complaint ſhould be in writing: On his own view, he may commit *ithout* complaint, if he has *reaſon* to *apprehend* the peace *will* be roken, though *not actually broken*.

The juſtice, too, *ought* to have produced *witneſſes*, to ſhew the round of the commitment.

God forbid, too, that a man ſhould be *puniſhed* for *reſtraining* the *ury* of a lunatic, when that is the caſe.

But if it is ſo *here*, Mr. *Hopkins* did not *act* under his *office*: There is a *ſpecial* power given to *two juſtices*.

It is a great ſatisfaction to a judge, that a nonſuit is not concluſive.

I think this *rule ought* to be *abſolute*, and the cauſe be tried, *without prejudice* to the queſtion, whether Mr. *Hopkins* acted *within* his office, or no.

Mr. Juſtice *Aſton*—The intent of the act 24 *G.* 2. to be ſure is, that on *notice*, the juſtice may tender *amends*, without going to *trial*.

I can't ſee on the *evidence*, whether the defendant acted in execution of his office, or no. I think, therefore, the *rule* ought to be made *abſolute*, *without prejudice* to the queſtion.

Mr. Juſtice *Aſhburſt* nearly to the ſame effect.

Mr. Juſtice *Willes* was abſent.

Lord *Manſfield*, however, thought it ſo hard a caſe, that he extremely wanted the parties to come to an agreement: And at laſt ordered the rule to ſtand as it did, and *not abſolute*. He ſaid, he was fully perſuaded in his own mind, however the matter went.

Rule suspended, *to ſee whether the parties would come to an agreement.*

Vide 24 *G.* 2. *c.* 44.

Caſe of Rookes, Executor of Stansfield, & *al.* Proprietors of the Navigable Canal from Leeds to Liverpool.

ACTION of trover and converſion for having detained wood of the property of the plaintiff.

The principal queſtion was, Whether the jury had aſſeſſed the value of the wood, as well as of the land, in their verdict? And in point of law, whether upon the conſtruction of the act they could?

Mr. *Wallace*—That by the act, commiſſioners, or any five of them, were empowered to aſſeſs the value of lands, or *underwood*, in order to make a compenſation.

And if the party does not chooſe to abide by their deciſion, then a jury to be ſummoned, to enquire and aſſeſs, and their verdict *final and concluſive to all parties.*

It was objected, that the verdict at 55 *l. per* acre, did not include he wood.

That the plain import of the verdict appeared to be to include the vood: That the commiſſioners had excepted the wood; the jury nade no exceptions, and therefore certainly included it.

Evidence had been offered, that other jurors had valued lands of early the ſame value, at pretty near the ſame price, without the vood; and they would have introduced evidence from the *jurors*; hat they did not mean to include the *wood* in their verdict. But Mr. Juſtice *Gould*, who tried the cauſe, did not think this evidence roper to be admitted; and Mr *Wallace* hoped, that the court would hink the learned judge did rightly in rejecting it: For otherwiſe, f ſuch evidence were admitted, to narrow, or rather to ſubvert a erdict, there would be nothing certain.

On the other ſide, that the commiſſioners expreſsly went on the alue of the land only; that the jury were to try the ſame matter, nd eſtimate the value on the ſame ſubject, which was the land *nly*.

By the warrant iſſued, and by the only authority under which hey act, they can do nothing but ſet a price on what had been before conſidered, and aſſeſſed by the commiſſioners.

That it was ſaid, *wood* might be purchaſed, and paſs under the name of *land*: Admitted; but in this mode of proceeding, they re *ſtrictly* confined, and *can* go no farther than the warrant *expreſsly* limits their authority.

That they were ready to have offered evidence, that at the time the commiſſioners were to make a valuation of the lands, the land was not ſo ſet out that they could value the wood, either by the act or in the nature of the thing.

That they offered in evidence the declaration of the ſhewers themſelves, taken by the jury. "Gentlemen, you are not to value the " *wood*, but the land *only*." That this was the *expreſs* declaration of the ſhewers on both ſides.

That they offered evidence, that the jurymen themſelves acknowledged the impoſſibility of valuing the wood, as not being properly ſet out: And that on the ſame day, in a neighbouring wood, the ſame jury valued the land by itſelf, at the ſame price preciſely, without the wood. That therefore, both in law they *could not*, and in fact they *did not*, nor could in the nature of the thing, value the wood: And therefore, that the plaintiff will be entitled to a new trial.

Mr. *Dunning*—That he apprehended, by referring the verdict of the jury to the precedent adjudication, and conſtruing the two inſtruments together, the court would ſee, that the jury could not take in the wood. That though this was not, in ſtrict propriety of words, an *appeal*, yet there was in it the nature of an *appellant power*; ſo that a new ſubject could not be included.

That parol evidence had been objected againſt; and parol evidence in ſubverſion of a verdict: That however, it did not ſubvert, but *explain* and *ſupport* the verdict. And that whether parol evidence was or was not received, it could never be imagined in common law, or common ſenſe, that the matter appealed againſt is not to be taken into the conſtruction of the verdict.

Lord *Manſfield*—Is there an expreſs power to the jury, to eſtimate the wood ſeparate from the land?

Mr. *Dunning*—None in terms; but the practice has always been ſo.

It was farther contended on the ſame ſide, that either according to their warrant the jury aſſeſſed, excluſive of the wood, or they did what was not within their authority, and therefore void.

That it appears clearly in point of fact, that they aſſeſſed no more than the commiſſioners; and in point of law, that they could aſſeſs no more.

That here, the *whole* jury ſaid it was the land they valued, and that only. Suppoſe the evidence of the jury *not* to be *admiſſible*, that there was evidence which they were ready to have given; that the jury *only* walked over the ground: And was this the way to make a valuation of wood? Does any body buy or ſell timber ſo? And finally, that they either did not in fact value, or by law could not value any thing but the land.

Lord *Manſfield*—Upon the face of theſe proceedings, cannot ſay I am ſatisfied the valuation of the jury reaches to the timber.

That the power of the jury was relative to that of the commiſſioners and coordinate to it.

By the act, the authority to the jury is, in caſe of diſagreement; The *warrant* is, to ſet a value upon the land and grounds *aſſeſſed by the commiſſioners:* And to be ſure their *proper* juriſdiction was, to value the land *only:* The *commiſſioners* might value the *wood* at another time, and the parties be ſatisfied.

I am very far from being clear that the *wood was* taken in; ſo far, at I rather think it was *not*.

In ſo doubtful a caſe, therefore, *I don't quite* enter into the *ob*-*ction* to *parol* evidence.

That parol evidence is proper to explain a doubtful fact.

In the *nice* queſtion as to *identity* of action, you may, to *avoid* is *preciſe* objection, *aver* the *identity* of the action.

And whenever the jury have deducted, I have often *ordered* an dorſement to be made on the poſtea, to avoid the queſtion being ade, and by *conſent*.

The rule is very *wiſe*, that a *juror ſhall not ſay*, "*I ſaid this in my verdict, but I don't mean according to thoſe words, I was over-ruled*"—or the like.

But this is only *trying what was* the *queſtion* before the *jury*, hich would be admitted on a *judge's certificate*; which might be *erred* by the *commiſſioners* or *ſhewers*.

That though a juror ſhall not contradict his verdict on the cauſe before him, yet on the doubt what was the queſtion before him, the evidence of a juror and other evidence is proper.

Mr. Juſtice *Aſton*—That there was *no diſpute* between the parties out the wood, therefore not natural they ſhould find for the *wood* -It would be *great injuſtice* to *deny* a new trial.

Mr. Juſtice *Aſhhurſt*—'Tis clear there was no original juriſdiction the jury; therefore, *we muſt take it* they acted *right*; that is, *rſuant* to their *warrant*, by *reconſidering only* the *adjudication* of e *commiſſioners*. And if there was an *occaſion* for *parol* evidence, think it would come in *very properly*.

That the power of the jury was not original; that it muſt be preſumed they acted according to law; that is, according to their derivative power, expreſſed in the warrant.

RULE MADE ABSOLUTE FOR A NEW TRIAL.

Lord *Mansfield* ſaid he ſuſpected the jury had found the value of e wood and land *both*, though they thought of nothing but the nd.

Attorney.

SERVICE to an attorney's *agent* conſidered as ſervice to himſelf.*

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* Qui facit per alium facit per ſe.

Evidence.

Evidence.

Rule of Diſcovery.

Regula ex æquo et bono.

LORD *Mansfield*—If there is any deed on which nothing turns, as to the *merits* or *ſubſtance*, but which, in point of *form*, is *neceſſary* to be *ſhewn*, and the parties *refuſe* producing it, thereby putting the *oppoſite* ſide to *great coſts* and *trouble*, and frequently *great delay*; and they *loſe* their *ſuit*; I *always* order the *maſter* to draw up the *whole* coſts incurred on the *other* ſide by ſuch *unreaſonable* conduct; as I remember I *did firſt* in a caſe, when they *forced* a witneſs to *come* from *Portugal*, to *prove* an *exhibit*. I made the *maſter* draw the rule, charged with *all* the coſts of *bringing* this *evidence*, which the *other* party *might* have *ſpared* them.

> *Note*, This was in a caſe in which they had *refuſed* to admit the entries in a *cuſtom-houſe* book, and *obliged* the officer to quit his own and the *public* buſineſs, at the port of *Briſtol*, to *come* up to *town*, to *prove* the entries.

His Lordſhip ordered the rule to be made that they *ſhew cauſe why the cuſtom-houſe entries* ſhould not be admitted.

> *Note*, As to the caſe of the weſt riding of *Yorkſhire*, it ſeems, there had been a miſtake; and that it was meant to have been directed to his Lordſhip in his capacity of *judge of aſſize*, and not in that of *Lord Chief Juſtice of the King's Bench*.

Double Writs.

NOTE, a *writ* of *fieri facias* and *capias ad ſatisfaciendum*, both iſſued out together, motion to reſtore the *money levied*, the *body* being *already diſcharged*.

The motion was made by Mr. *Dunning*, on the ground that it was *incompetent* to ſue out *two* writs at the *ſame* time againſt the *ſame* perſon, on the *ſame* cauſe. That in ſuch caſe, a common writ of execution out of this court would draw *all* the conſequences of an *extent* out of the *Exchequer*.

Lord *Mansfield* ordered the rule to be made abſolute, and obſerved, they had only aſked too little; for they might have aſked to ſet aſide *both* writs.

RULE ABSOLUTE.

Judgment.

Judgment.

MOTION for leave to enter up *judgment* for the *defendant*.

This was on the queſtion of ſalvage of a veſſel mentioned above. erdict was given for 130 *l.* *conditioned* to await the event of arbi- ation: That if the arbitrator ſhould decide the claimant to be en- tled to more than 5 *l.* then this ſum ſhould be in hand, to anſwer is coſts and *damages*; but if the arbitrator ſhould find *no more* than *l.* then that plaintiff ſhould pay the coſts, and judgment be en- red for the defendant. Arbitrator did not find above 5 *l.* and *dgment* was thereon moved for the defendant, *which was granted ccordingly.*

Vide the King *and* Davis.

Service.

MOTION, that ſervice on the party's clerk in court, ſhould be good ſervice, on ſuggeſtion, that he abſconded to avoid rvice. *Not granted:* But inſtead thereof, *rule granted*, that ſervice his laſt place of abode ſhall be good ſervice.

Jackſon's Caſe.

ACTION of treſpaſs againſt overſeers for taking his gelding. They alledged, that by virtue of their office, and in purſu- nce of a judge's order, they levied ſatisfaction for a poor's rate, hich was the treſpaſs complained.

It was objected on the trial, that by the ſtatute of 24 *G.* 2. de- and ſhould have been made of the peruſal of the juſtice's war- nt, and ſix days neglect or refuſal.

Judge being of the ſame opinion, plaintiff was non-ſuited.

In ſupport of the non-ſuit, that this was a remedial act, and to conſtrued according to the rule in *Heydon*'s caſe, ſo as to *ſuppreſs* e *miſchief*, and *advance* the *remedy*.

That the miſchief was, that juſtices were often enſnared by ſur- ize on ſome little inadvertency into which they had fallen; that e remedy was, giving them a power to rectify that inaccuracy or miſtake; ſo as neither the perſon affected by it might ſuffer, nor the juſtice be vexatiouſly harraſſed.

That in order to this, notice is required by the ſtatute to give the party a power of tendering amends, bringing money into court, or pleading as he ſhould be adviſed.

Vide 24. G. 2. c. 44.

A mente legiſlatorum.

That by *ſec.* 6. Conſtables and headboroughs are likewiſe not to be proceeded againſt, without demand of peruſal of the warrant: That churchwardens and overſeers are within the *ſame reaſon*, and therefore within the *remedy*; that after conſtables, headboroughs is added by the ſtatute, or *other officer*.

A verbis.

That perhaps it would be contended officers *ejuſdem generis* were meant; that however in a remedial act, the churchwardens and overſeers were not to be excluded, who had a principal need of the juſt protection of the act.

A ſimili.

That farther, they are acting under the order of the juſtices, and in behalf and aid of juſtice.

That both by the *ſpirit* therefore, and letter of the act, the *churchwardens and overſeers* are protected.

A ſtatutis in pari materiâ.

On the ſame ſide, that by the ſtatute of 4 of King *James* c. 5. the churchwardens were not protected; that the 21 of *James* was provided for their benefit as far as that ſtatute extends.

That the ſtatute of 24 G. 2. was remedially provided for ſuch officers as are not taken notice of in either of the former acts.

That the juſtices have power by warrant to iſſue out diſtreſs and levy the poor's rate; that theſe officers acted regularly, and as they were bound to act.

That the plaintiff was not without remedy, for he might have had a replevin. That there had been a caſe in the Common Pleas where the *collector* had been conſtrued an officer within the ſtatute, before Lord Chief Juſtice *Wilmot*; the ſame in effect as in this caſe.

It was argued from the reaſon of the act, that it was neceſſary to give protection as fully as might be to officers concerned in the maintenance and regulation of the poor.

Ab inconvenienti.

On the 43 of *Eliz.* he is liable to an indictment if he does not execute the precept.

27 *G.* 2. *c.* 20. On an Act for the more eaſy and effectual pro- eeding on diſtreſs. Clauſe, that the officer executing ſuch war- nt ſhall deduct reaſonable charges, *&c.* and theſe general words, omprehend officers of *all* deſcriptions who are empowered to exe- ute the warrant, and as far as they act under the juſtices order: Churchwardens and overſeers are officers *ejuſdem generis*, with con- ables and headboroughs.* And why, might not the prerogative ounty of the legiſlature extend farther relief and remedy upon oc- aſion ſeen than had been done by the more antient ſtatutes, be- ore that occaſion was ſeen and apprehended?

On the other ſide, that by the 43 *Eliz.* the diſcretionary power s to the poor's rate, is not in the juſtices of peace but in the pariſh fficers; churchwardens and overſeers *ſhall* proceed by precept from e juſtice; that therefore, the juſtice is obliged, whatever he might ink, to grant ſuch warrant or precept. That the 24 *G.* 2. is pro- ided in caſe the juſtice does wrong; how can he do wrong here, here he has no diſcretionary power? "Other perſon acting by his order, or in his aid" does too extend to pariſh officers? Then, at an action is to be brought againſt a conſtable, without making e juſtice a party. Upon very good reaſon, 'tis preſumed, that it ay be ſeen where the fault lies. But that here if the rule were uaſhed an action would lie againſt the juſtice, who yet cannot be fault.

That the conteſt between the overſeers and the plaintiff was, hether his horſe was taken within the pariſh to which the over- ers belonged.

Lord *Manſfield*—There is no ſuch thing in the caſe, it never ame into queſtion, nor is reſerved on the caſe. *Expreſsly* on the port the queſtion is *only* "*whether the overſeers are within the* 24 *of G.* 2." It never was made a queſtion, as I underſtand in the port, whether they acted purſuant to their warrant.

Objection: That the judge ſhould not have nonſuited till proof at *B.* the place where the horſe was taken, lay within the pariſh.

Lord *Manſfield*—If they *exceeded their warrant* there's an *end* of e ſtatute; [for the ſtatute was made to protect thoſe who acted nder warrant: not thoſe who acted without.]

Mr. *Cox* ſaid that he was in the caſe, and contended that the verſeers were *not* within the ſtatute; the judge called for the act and pronounced on the words of that "they clearly *were*;" an that accordingly it was a clear non-ſuit.

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* Quando duo jura concurrunt in eadem perſona idem eſt ac ſi eſſent in diverſis.

Lord *Manſfield*—*They are certainly within the act of the* 24 G. 2 and if the doubt had been on the other point, he would have calle for the juſtices warrant.

Mr. *Davenport* however endeavoured to go on the ſame ground as Mr. *Cox*, to ſhew the overſeers and churchwardens *not* within th act.

Lord *Manſfield*—The *only* queſtion is "whether overſeers are "within the 24 *G.* 2."

No juſtice is compelled to grant an illegal warrant; *and every lega warrant he is bound to grant*.

The *warrant* is the *authority under which* the *overſeers* act. To *extend* the *benefit* of the ſtatute of *James*, was the intent of the ſta-tute 24 *G.* 2. and that *all* officers *acting under a juſtices warrant* were *included by it*. If they had diſtrained *out* of the *pariſh* it would have been *no* protection.

The judges *Aſton* and *Aſhburſt* were of the ſame opinion, as to the clearneſs of the caſe and the effect of the act.

The rule moved was to ſhew cauſe on a *ſpecial caſe*, *reſerved* at the aſſizes, why the nonſuit ſhould not be ſet aſide.

RULE DISCHARED.

Bail.

ON exception to bail becauſe they were *three* in the notice; the court was of opinion the exception was *not* good, and that the notice was good though *three* were mentioned, provided they could all juſtify.

Aſſault.

MOTION to diſpenſe with perſonal appearance of defendant, convicted of an aſſault.

The court ſaid, *it was not to be done for aſking*; however the rule was taken *by conſent*, the clerk in court undertaking in the uſual manner.

Information

Information.

MOTION for an information againſt diverſe inhabitants of the town of *Dover*, for aſſembling with beat of drum, making great riot in the town, attacking of the conſtables, attacking one of e magiſtrates, threatening to make a *Brentford* election of it; and at they *obſtructed the mayor in attempting to read the riot act.*

Mr. Juſtice *Aſton*—If they continued without diſperſing an hour, ter the riot act being read, 'tis within the ſtatute, and we *can't* oceed by way of *information*; however we will *not intend* it, un-ſs it appears.

Letters of Adminiſtration.

MOTION for a rule to ſhew cauſe why an extract from the Conſiſtory Court, ſhould not be ſufficient oyer of letters of miniſtration.

The ſuggeſtion, on which this rule to ſhew cauſe was obtained, as that the party who demanded *oyer* of theſe letters had made the her drunk, and picked his pocket of them.

Rule to ſhew Cause.

Sheriff.

SHALL not be entitled to poundage if judgment irregular.

Latitat.

ON the firſt proceſs on latitat, *perſonal ſervice* cannot be diſpenſed with; to allow otherwiſe, would be to repeal all the s relative to outlawries; the very nature of the writ ſuppoſes the rty will hide himſelf.*

n a Motion for a Mandamus to admit Mr. Webber, a Reſidentiary Canon of the Church of Chicheſter.

Conſtitution ſtated.

A DEAN and four canons reſidentiary, who are to elect a reſidentiary canon on vacancy of any of the number.

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* In fictione juris ſemper ſubſiſtit æquitas.

That by the rules and cuſtom of the church he who has the majority of votes in his favour ſhall be elected.

That Mr. *Webber* had two votes; the dean for Doctor *Pettiwarth*; and the third canon for another gentleman; ſo that Mr. *Webber* had the majority as againſt either of the other two candidates.

That in all common corporation elections, that in elections for members of parliament, the major part with reſpect to the other candidates is ſufficient.

Local conſtitutions were ſet up againſt this general cuſtom, *viz.* a bye law the 15th of *October* 1573. No one ſhall be elected a *reſidentiary* canon unleſs he have firſt the *good will* of the dean; and have *alſo* the *majority* of the *canons beſides* the dean.

That the church of *Chicheſter* is a very *ancient* inſtitution; one of the moſt *antient*.

In reply to this—that no former inſtitution is ſtated before this bye law, though the church of *Chicheſter* be ſo antient; that if there are *any* bye laws to govern a chapter it muſt be by the *viſitor*, exerciſing his *viſitatorial* power.

It is ſtated as an ordinance *made* by the dean and chapter, and *confirmed* by the biſhop; *negatively* it appears therefore, not *exerciſing* his *viſitatorial* power. It does not appear the *cuſtom* of elections has *agreed* with this bye law. The *dean* is *never named* in the *regiſtering* of *theſe elections*.

The dean indeed ſays, he *believes* the cuſtom has been in favour of the negative voice of the dean; but he aſſigns *no* reaſon.

The two canons for Mr. *Webber* ſpeak *as* poſitively to the *contrary*.

That by the ſtatute of *H.* 8. the bye law, if it were ever ſo good *originally*, it could not ſtand.

That the canons have *always declined* bringing this queſtion before a *temporal* court.

That by the ſtatute 33 *H.* 8. *c.* 27. *anno* 1541. it is provided albeit, that *whereas all* leaſes *made* by *dean* or *warden* have as *good* an effect as if the *whole* body had aſſented; yet by *peculiar cuſtoms and local inſtitutions* the ſame were *not good* by any *one*, or more, *diſſenting*;

ing; that, to eſtabliſh an uniform reaſon and conformity univerſally, ſuch diſſent of any *one* of the body, or more, *ſhall not* hinder the *making of ſuch leaſe.*

That the reaſon aſſigned by Serjeant *Burland*, that it was deſigned o make ſeſſions of eccleſiaſtical bodies eaſier was allowed; that this reaſon ſo aſſigned and allowed was againſt the dean, for that the dean having a negative voice would *obſtruct* and *not* facilitate, nd would not be introducing the uniform reaſon of the common aw.

That as to the point, that by common law he muſt have the majority of the whole body, this is not a queſtion of votes upon a ſingle ſubject, as granting leaſes or the like; but it is a caſe where the choice *ſplits itſelf* amongſt *ſeveral* candidates: That in ſuch caſe he who has the majority with reſpect to the others, has a *ſufficient* majority by common law, to which this ſtatute of *H.* 8. meant to reduce *all* elections.

That before 1723 the cuſtom was not according to the old bye law of 1573; that the decree of 1723 provides that no *ſingle* perſon as had before been uſed ſhould *elect ſeparately*, and that two months *notice* ſhould be given of any vacancy, to *prevent prejudice* to the rights of the reſt: That if he does otherwiſe he ſhall be guilty of breach of truſt, and be dealt with according to law.

Lord *Mansfield* aſked, whether there was any inſtance either way.

Mr. *Bearcroft* ſaid, there was one inſtance in which the biſhop, not being able to decide, *decreed the competitors to divide between them.**

* This decree would have been ſomewhat novi generis at common law.

Evidence of the death of Mr. *Trevigan* the precedent reſidentiary, and that the dean and chapter met in the chapter houſe of the aforeſaid church of *Chicheſter* capitularly aſſembled; and that then and there they proceeded to election of a reſidentiary to ſupply the ſaid vacancy: Due notice having been firſt given of ſuch aſſembly to be held, and that the votes were as hath been ſtated above. Whereupon, Mr. *Webber* humbly ſubmits it to the court that he was *duly* elected, and accordingly *prays* a *mandamus* may be directed to the *dean* to *admit* him; that he applied to the dean to admit him, who abſolutely refuſed, and would aſſign no reaſon. That the deponent is ignorant of the ſtatutes and conſtitutions of the ſaid church; but that he believes the refuſal to admit him was founded on a certain *obſolete* ſtatute or bye law, which gives a *negative* voice to the dean.

Order of 1723. *In domo capitulari coram reverendo viro* Thoma Sherlock *decano*.

Lord *Mansfield*—I ſee the biſhop of *London* (*Sherlock*) was the dean, who *knew as much* of the *canon* law,* *and a great deal of the common law*, as any man.

The order ſtated: That "whereas the preſence of the whole "body had been not neceſſary; and that one or two had been uſed "to proceed to election; that *henceforth no man ſhall be elected* without two months notice, or with leſs than *two* canons preſent: "Proviſo, that this ſhall not extend to elections made *ſooner* by the "*dean* and *whole* body, or in which the *abſent* members ſhall give "their *conſent* in writing."

The dean of *Chicheſter* made affidavit, that orders had uſually been made by the dean and chapter, and confirmed by the biſhop.

He then ſtates the order or ſtatute of 1573, "that the conſent of "the *major* part *beſides* the *dean* ſhall be neceſſary:" And farther ſets forth that neither he nor the Reverend Mr. *Hurdis*, who voted for Mr. *Miller*, gave conſent to the election of Mr. *Webber*.

The Reverend Mr. *Franklin*, who voted for Mr. *Webber*, ſtates the ſame order or bye law in his affidavit; and farther ſtates, that it does not appear by the book or otherwiſe that this bye law, order or decree, has been put into execution by giving the dean a negative.

That they had appeared always to go by the rules of *common law*, which gives the election to him who is choſen by the *major part*, with reſpect to the reſt.

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* He was originally bred and, I believe, called to the bar; and the traces of that profeſſion ſeem very evident in the clearneſs, cloſeneſs, and method, with which he has arranged his arguments, and his manner of diſcuſſing and weighing evidence, particularly in his proofs of the reſurrection. I do not mean that this knowledge is not viſible in the profeſſors of theology, and of the other liberal profeſſions arts and ſciences; but I conceive it is peculiarly forenſic, and no where more ſtriking than in *Sherlock*, who thus became an honour to two profeſſions by a very rare and eminent felicity, and I hope it will ſhew there is more of amity and mutual connection and ſupport between the two profeſſions than is uſually ſuppoſed. And that *Themis* furniſhes no bad arms for piety and truth; and that there is no part of liberal and uſeful knowledge from which the ſtudy of the law does not borrow, and to which it does not lend, ornament and aſſiſtance.

Farther joint affidavit, by the *two* voters for Mr. *Webber*, "that "the order had never been regiſtered; that it was never referred to "in the acts of the dean and chapter."

A caſe appeared from the books where the dean and one canon oted for one candidate, and two canons for another; and on refeence to the biſhop it was appointed "that there be *five* canons *pro ac vice*, and two reſidentiaries; which ſaid two were to divide the rofits between them; and that the ſenior be firſt admitted.

In ſupport of the rule, Serjeant *Glynn*—The queſtion is not wheher Mr. *Webber* is entitled to a *mandamus*; but in the nature of an ppeal of the parties, whether he is not duly elected?

That he had the common law majority in his favour. Objection, hat he ſhould have the canon law majority; and alſo the *conſent* of he *Dean*.

As to the inſtitution of 1573, it was before doubted, whether it was a bye-law, or part of the original ſtatute; it now appears to be bye-law. It has not the ſeal of the church, nor the epiſcopal eal: Therefore it is defective, for want of being authenticated either y the church or the biſhop.

It ſeems, that the bye-law, by ſome miſtake, was never either confirmed or rejected by the ſociety.

The biſhop's conſent was never neceſſary to a bye-law, if good in itſelf, but the dean aud chapter are ſufficient.

As to the particular apprehenſions of particular members, the dean would ſupport it by uſage, ſince it wants uſage; but it is only on ſuggeſtion: He gives no inſtance.

That the order of 1723 ſpeaks not of majority; ſpeaks nothing of a negative voice, though by ſo learned and laborious a man, and of *no great facility* in giving up a right of office, as *Sherlock*.

That they had conſidered themſelves as governed by the ſame rules as a lay corporation.

That before the bye-law, the obvious rule, that a majority in reſpect of the other candidates is ſufficient, obtained, as at common law; that the bye-law is *void*, as *repugnant* to their original conſtitution; and as againſt the ſtatute of *H.* 8. and introducing greater difficulties than before the ſtatute.

That the act profeſſes to reduce the right of eccleſiaſtical elections to common law: That it has been objected, there is no ſtanding rule of elections at common law, but the appointment of the founder; but the ſtatute *expreſly* extends to take away what it conſiders as an inconvenience, and provides that there ſhall be *no negative* voice. Therefore the negative of the dean is void; and as to the conſent of the majority of the whole, required by the order, it is required againſt the rules of common law, which the ſtatute makes the ſtandard, againſt the conſtitution, againſt the uſage, of the church of *Chicheſter*.

Lord *Mansfield* aſked, whether they had a copy of the ſtatute of 1573?

They ſaid, they had no full copy, and Lord *Mansfield* took notice, that the copy before the court was only a notorial copy, and ſaid the indorſement "original ſtatute of the church of *Chicheſter*," is certainly, I think, a very *modern* hand; and that the names ſubſcribed are all in one hand.

Serjeant *Kempe* argued on Sir *Saliſbury Cotton*'s caſe, 53 *Strange*; which was, by the charter of *Denbigh* there are two bailiffs, two aldermen, and twenty-five capital burgeſſes; and by the charter, if a capital burgeſs die, or be removed, it ſhall be lawſul for the bailiffs, aldermen, and capital burgeſſes, or the major part, *quorum unum ballivorum & unum aldermannorum duo eſſe volumus*, to elect another. Determined, the preſence only of *one* alderman and *one* bailiff neceſſary; and that they have *no* negative voice.

That here the bye-law requiring a majority, *contrary* to the *common* law, *ſtatute* and *uſage*, and to the *prejudice* of a *third* perſon, was void.

Mr. *Dunning*—That the inſtitution ſtates, that *before* the members uſed to proceed *pari vote*, which *excludes* a *diſſenting* voice.

That in 1687 they *repeal* the bye-law of 1574, which was *nearly* to the ſame effect, on a different ſubject, as that of 1573, and *only* a year later; and that therefore, it ſeemed, that at that time the *bye-law* of 1573 was *either repealed*, or *had repealed itſelf* by diſuſe.

In 1723, it ſeems, that a *ſingle* perſon was held ſufficient by the ſociety to do a capitular act.

It is true, that livings in the gift of the church are ſpoken of in the *enacting* part of that order, and not in expreſs words, "reſidentiary canons:" But the preamble is as large as poſſible, and it folows in *pari gradu*.

As to the idea which the learned Serjeant (Serjeant *Burland*) sugeſted, of the biſhop of *Chicheſter* being viſitor, I hope it's not true: or then, I am afraid, we ſhall be told, that we have nothing to do ere; but I take it, he acted as a friend.

Lord *Mansfield*—There is no viſitor at *Chicheſter*, in the idea hich you ſuggeſt, as in the two univerſities.

Mr. *Lee* began with obſerving that it was contended, that by the *ommon* law, a majority of the *whole* body was required; and was oing to cite caſes to the contrary: But Lord *Mansfield* ſtopped him, nd ſaid, they don't ſay there is any ſuch rule by *common* law, but y *canon* law. *The counſel who made that obſervation always goes upon ight grounds.*

Mr. *Lee* proceeded, that by virtue of the ſtatute, the *negative* was *at leaſt taken away*, in all caſes, *except* where the original inſtiution of the founder had given it.

Burn ſays, (I cite *reaſon* rather than authority) that he thought the *intent* of the ſtatute was to take away the negative voice.

Note, in a former part of the argument, the caſe *de capitulariter congregatis*, in Sir *John Davis*'s Reports, was cited, which is highly worth reading.

Lord *Mansfield*—I take it, that at every meeting for a reſidentiary the dean has voted. It is *expreſsly* ſaid, that it was ſo upon the laſt election.

The church clerk was aſked by his Lordſhip, whether the dean and reſidentiaries were uſed to meet; and whether the dean voted? He anſwered *yes*; *always*.

Lord *Mansfield*—Then it is *apparent*, that the *dean* hath *not* a *negative*; for elſe the *canons* would *elect*, and *preſent* to the *dean*.

On the other ſide, contended, that either in *general* the majority of the *whole* body was required, or elſe that Mr. *Webber* was at leaſt *excluded* by the *peculiar* inſtitution.

That as there was no original ſtatute to regulate the election, it muſt be underſtood, that either by uſage or bye-law, the election in behalf of Dr. *Pettiwarth* is good. That the dean is an elector, and muſt be preſent, and either *nominate* or *aſſent*.

That as to the objection, that the law is void in itſelf; void, be cauſe it does not appear regularly formed; that it's bad by commo law; bad by being obſolete; and bad by ſtatute.

Anſwer, That it is a law of two hundred years ſtanding, an preſented by an authenticated copy; and that it did not appear that in any lay corporation the *ſeal* is required to authenticate a bye-law: That as to being *void in itſelf*, it is certain it would have bee *good* by a founder *before* the ſtatute;* and that the *ſtatute* did n take away ſuch *negative* voice, if *given* by a founder: And that i it were a bye-law made *before* the ſtatute, *not contrary* to the *original* conſtitution, it would be *as* good as if made by the *founder*.

As to it's being *obſolete*, that the entries before the year 173 don't ſtand *contrary* to the law, that when they *repealed* the ſtatu of 1574 by *not* repealing that of the *preceding* year, they *confirme* it. At leaſt, that and the other being *both* in the *ſame book*, and ſo *cloſe* together, they could *not overlook* it.

That it would not be *bad*, by not agreeing in all points with the *ordinary* courſe of common law, in which, however, there were many diverſities, unleſs it could be proved bad for ſome of the foregoing reaſons.

[Lord *Mansfield*—It has been taken from a roll; it does appear *hardly* to have been in any book.]

That as to the order of 1723, it is not that a ſingle canon *ſhall* elect; but it is that one or two ſhall *not* elect in the abſence of the reſt, without notice.

That it is ſubmitted to the court, that it rather affirms the principle of a majority of the whole body being neceſſary, by ſaying nothing of any inconvenience ariſing.

Lord *Mansfield*—I doubt the words are ſtronger.

The words were admitted to be very ſtrong; but it was ſaid, they ſuppoſed an abſurdity, that could not happen, either by *ſtatute* or *canon* law; that one canon, in the abſence of the reſt, without *notice*, or *regular meeting*, ſhould *elect* a reſidentiary.

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* The order of 1573 is clearly thirty-two years after the ſtatute; but I think it was contended 1573 was in ſupport or affirmance of ſome more ancient cuſtom.

That the caſe in 1735 was a matter that could never come in queſtion; it was *no election:* The four were divided into *equal* numbers; *two* on one ſide, and *two* on the other.

That it was probably a reference in compliment to the biſhop.

Lord *Mansfield* obſerved upon it, that if the dean claimed a caſting voice at that time, then the order of 1573 was ſet aſide, which excluded the idea of a caſting voice.

In continuation of the argument, it was ſaid, that the miſchief provided againſt by the act was, that the diſſent of any *one* member, *not being the dean*, or *head*, would be a *prevention*. As to the *head* of the corporation, they were *not* in fear of procuring his *aſſent*; but the *fear* was, leſt a ſingle *opponent* amongſt the whole body ſhould *obſtruct* the whole. And why ſhould the *univerſities* have a *negative* voice, which are *merely lay* corporations, if the *negative* voice was to be taken *away*, in the caſe of *dean* and chapter, which are *ſtrictly* an *eccleſiaſtical* juriſdiction, and governed *more immediately* by the *canon* law, which gives ſuch a *negative?*

The caſe was *ordered* to *ſtand over* for the *ſecond* day of *peremptories* in the next *term*.

Whereupon *poſtea*, to wit, in the next term, on looking into the books, &c. of the corporation, and *conſidering* the caſe, the court granted the *mandamus* in favour of Mr. *Webber*.

RULE ABSOLUTE FOR THE MANDAMUS.

Treſpaſs.

ACTION brought in the ſhape of treſpaſs. On hearing the nature of the caſe, Lord *Mansfield* ſaid, they ſhould have brought an action for *money had and received*; and added, *You know the treſpaſs may be waived, as has been ſolemnly determined.* Vide *Feltham* and *Terry ſupra.*

Immaterial Counts.

MOTION to ſtrike out the immaterial parts of the declaration, with coſts. It was an action of eſcape againſt the ſheriff.

Rule to ſhew cauſe, why it ſhould not be referred to the *maſter*, to expunge the unneceſſary and immaterial parts, and *with coſts*.

Note, It is always the practice to grant this rule, in all caſes where the declaration is *materially ſuperfluous* or *irrelevant* in it's parts. And there is a *ſimilar* practice in Chancery.

Common Pleas, 22 *May* 1773.

In the Caſe of General Moſtyn.

ON a motion to *enlarge* a *peremptory* rule for going to trial, in this cauſe, which was an action of falſe impriſonment, brought againſt the governor of *Minorca*, by *Fabrigas*, a native.

The ſuggeſtion on behalf of the rule was, that a witneſs material to the defendant in this cauſe, and on whoſe abſence it had been enlarged before, had been unexpectedly delayed, but was now daily expected from *Minorca*.

It was urged againſt the rule, that this witneſs was in *Minorca* when the general was there; that he might have brought him with him; that he had *once already* enlarged the time; and that the rule was *peremptory*.

On the other ſide, that general *Moſtyn* was in no default for not bringing the witneſs; that the court having granted the precedent rule in his favour, on account of the neceſſity of the witneſs, would grant this farther enlargement, the witneſs being ſtill neceſſary. That the defendant would riſque ten thouſand pounds damages, and, what was of ſtill more conſequence, reputation, if he went to trial without him: That the plaintiff would not ſuffer, as judgment might be had as early of next term as they pleaſed, they being ready to try on the ſecond ſittings of the term; and that if they tried the iſſue the ſittings after this, they could not have judgment before the fourth of the next term.

That it was true rules once enlarged before ſhould not be granted, where the perſon making requeſt had been the cauſe of the delay, by not exerciſing his proper powers, and uſing the occaſion in his hand; but not when the party applying was not guilty of neglect, and where the ſame cauſe of neceſſity ſubſiſted, as induced the court firſt to grant the rule. That the promotion of juſtice was what muſt govern the court in this, as in all other ſubjects of determination before them; that ſurprize and delay were the two evils to be avoided, and that the defendant was ready to give them all poſſible ſecurity againſt either.

The Court granted the **Rule peremptory**, to go trial the ſecond ſittings in the next term, explaining the meaning of *peremptory* to be unleſs the defendant hindered by *tempeſt*, or ſome *inevitable* accident from producing his witneſs.*

A peremptory rule always means ſo far peremptory, as may conſiſt with juſtice.

Bail.

AN Attorney is not bail.

Riens per Deſcent.

Campbell's Caſe.

ACTION againſt executor, charging him with aſſets, *riens per deſcent* pleaded. It appeared in evidence that the plaintiff had a *ſhilling* from his anceſtor; and it was contended that for his *falſe plea*, he ſhould be charged with the whole debt.

3 W and M. c. 14. heir may plead riens per deſcent, and the jury ſhall enquire into the value of the lands deſcend. Vide Palmer *v.* Jones. 1 Vern. 134.

Lord *Mansfield* —I remember a caſe in which I was counſel for the Duke of *Portland*, in which the ſword-blade company came for 200,000*l.* aſſets; there was a great apprehenſion leaſt there ſhould have been ſome ſmall circumſtance to catch at. It would have been a terrible injuſtice to charge on account of a *falſe plea* of ſome trifling matter, by miſtake of inadvertency, for the *whole* debt: As I remember in the chancery caſes, where an executor was charged with aſſets, by reaſon of the repair of a chimney-back, about the value of 10*d.*

In the caſe now before the court all the land was deviſed away; but the deviſe being void by the ſtatute of fraudulent deviſes, it was ſaid, it went to the heir by deſcent with reſpect of creditors: There was a bequeſt of a ſhilling to the heir, which he *never* received.

Lord *Mansfield* ſaid, *there never was an idea* that a *falſe plea* of *riens per deſcent*, *in ſuch an inſtance as this*, ſhould charge the party with the *whole* debt. That it would be *very unreaſonable* to charge him, on *ſuch* a ground, in *ſuch* a manner where the party *took in reality nothing by deſcent*.

Mr. *Dunning*—This is the caſe of a *diſinherited* heir at law, who comes in as by way of form only, that *complete juſtice* may be done to the *creditors*.

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* Lex neminem cogit ad impoſſibilia.

On *Campbell*'s engaging that he would not *obſtruct* the plaintiff, the plaintiff engaged that he would *pay* the coſts. But he ſays *Campbell*'s pleading *riens per deſcent has been* an *obſtruction* to him. Now *Campbell can't plead otherwiſe* according to the *ſubſtantial truth* of the caſe. The plaintiff will have his claim on the aſſets which may *hereafter* ariſe, and there *can* be *no* inconvenience to the plaintiff.

Lord *Mansfield*—I wiſh you had a *caſe* of authority, Mr. *Dunning*, to maintain that where a very *ſlight* deviſe, however *inconſiderable*, came to the heir, it ſhall *not* be *aſſets* to charge him with by *deſcent*. I aſked Mr. *Buller*, there being deviſes in the will which reached to the *whole* eſtate, *how* the aſſets came to deſcend. Mr. *Buller* replied, that by the ſtatute the deviſe was *void*, and *therefore* there were *aſſets*, *becauſe* the lands *deſcended*. But I *doubt* whether it *does* deſcend. The will is *void* with reſpect to *creditors*; but ſuppoſing there were *creditors* to 300*l.* deviſe to 700*l.* the will would *ſtand* as to the ſurplus. Therefore the deviſe is *void quoad* the *creditors* only, which does not appear to me to make deſcent of the lands.

Mr. *Buller*—I thought the defendant would have pleaded *riens per deſcent except* the lands in the deviſe; but *now* he has put us to trial upon a *falſe* plea.

Mr. Juſtice *Aſhhurſt* ſeemed to *recognize* this ground; and ſaid, he was *afraid* the deviſe *muſt* be charged with the *coſts*.

Lord *Mansfield*—What is the *practice* on the ſtatute?

Mr. *Wallace* ſeemed to ſay, that the practice was, that the heir pleaded *nothing* by deſcent; and that the replication was—"deſcended for the creditors."

Lord *Mansfield*—I find the *words* of the ſtatute *ſtronger* than I thought, and ſtated; for the ſtatute not only ſays "ſuch deviſe "ſhall be void as againſt creditors;" but "againſt them *only*."

Mr. Juſtice *Aſhhurſt*—If the ſtatute had been againſt the deviſe in general, then the plea of *riens per deſcent* would *not* have been *good*. But in this they *ſhould* have found for the defendant.

Lord *Mansfield*—It ſeems they had not *read* the ſtatute, for there is a proviſo that the heir may *plead riens per deſcent*, that the plaintiff may *reply* to that and a jury ſhall enquire, and if there *be* lands ſhall find the *value*. But upon a *nihil dicit* there ſhall be debt and damages.

Rule absolute to ſet aſide the capias and money to be reurned.

Mr. Juſtice *Aſton* ſaid, If an eſtate ſold for a great deal more han expected the deviſe is *void*, as againſt *creditors*, yet the lands ſhall not deſcend.

Notice.

IT ſeems that on a motion, on the fourteenth of his late Majeſty for judgment as in caſe of a *nonſuit*, the motion itſelf upon the ſtatute ſhall be held to be notice. And ſo, I have ſince heard from Mr. *Cowper*, is the practice.

14 G. 2. c. 17. Motion on the ſtatute held to be notice.

Rule:

WHEN a rule is made *abſolute* you can't *anſwer* to it, but *move* to have it *diſcharged*; for otherwiſe you might as well on a writ of *execution* on a *judgment* go into the *merits* of the cauſe.

Regula generalis.

Coſts.

23 *G.* 2. *c.* 33. *ſ.* 19.

“THAT where the jury find damages under 40*s*. the plain-
“tiff ſhall have no coſts, but the defendant double coſts, un-
“leſs the judge ſhall *certify* that the freehold principally came in
“queſtion, or that an act of bankruptcy principally came in queſ-
“tion: The act of bankruptcy muſt be *ſo* in queſtion as to be, to the *ſatisfaction* of the court, proved principally in queſtion.

Trinity Term

13 Geo. 3. 1773. K. B.

IN the caſe of the Reſidentiary Canonry of *Chicheſter*, I am informed (for I was abſent the ſix firſt days of the term, by reaſon of an accidental blow, from which I providentially eſcaped wit life;) that the two grounds on which the court decided were—firſ that the negative voice of the dean could not be ſupported by th bye law; ſecond, that by the uſage of common law, which ſeeme to the court to have governed the elections of the church of *Chicheſter*, a majority of the *whole* body was *not* neceſſary, but only majority with reſpect of the other candidates.

Notice of Ejectment.

ON a motion for a rule to ſhew cauſe why ſticking up the notice on the door of the houſe ſhould not be deemed good ſervice, no perſon being found in the houſe to whom to deliver th notice; the court ſeemed to think, that a *vacant poſſeſſion* muſt fir be proved.

Collins *v.* Dunch. *Burr.* 1116. was cited, that if no body could be found the might ſtick it upon the door.

Lord *Mansfield*—There is no difficulty, except as to the form.

The maſter was conſulted.

On the whole the court doubted, and it was ordered to be move the next day.

Campbell *againſt* Vaughan.

On Error from Ireland.

ON a queſtion, Whether eſtate for life, or in fee.

Special verdict. That on the fourth of *February* 1734, teſtator died, having made his will the *ſame* day.

« Deviſe, that my brother have my eſtate during life; and, after « his deceaſe, to his firſt and other ſons; the elder to be preferred « before the younger. And, for want of ſuch iſſue, my nephew « *Barlow* and niece *Catherine Fiſher* take ſhare and ſhare alike, du- « ring life; remainder to their iſſue male; remainder to the heirs « of my nephew *Barlow Scot* for ever."

The brother died without iſſue. The defendant claims under the brother; the plaintiff under the nephew.

Fine levied; the remainder man entered, to defeat the operation of the fine.

The court of King's Bench in *Ireland* determined the eſtate, that the teſtator's brother, under whom the defendant claimed, took only an eſtate for life.

It was contended, that the *plain intent* was to convey an eſtate tail to his brother's iſſue.

That as this could not be to the ſons as *purchaſers*, for want of words of limitation, therefore it could only operate as an inheritance, by conſtruing an eſtate to them, *through the father*, the brother of the teſtator.

An annuity is limited to the heir at law, to him and his heirs male, with liberty to diſtrain on default of payment. This annuity is limited to him and his heirs male, " till he come into poſſeſſion " of my eſtate," ſays teſtator, in *ſuch* manner as aforeſaid. Then follows limitation to nephew and nieces, for life reſpectively; then after their deceaſe, to the firſt and every other ſon, the elder to be always preferred before the younger.

Contended, that he firſt diſpoſed of the moiety for life, and confining the argument to the nephew, as whatever is truly inferred of him will apply equally to the nieces. Firſt, there is a life eſtate to the nephew; then to the firſt and every other ſon, ſhare and ſhar alike, without expreſs words of limitation. It was meant the ſo ſhould take an eſtate of inheritance: The words follow, "And fo "want of ſuch iſſue, remainder over." Now the nephew is foun to be the heir at law, in equal degree at leaſt of affection with th brother. Now if the words "for want of ſuch iſſue," had ſtood without thoſe to the ſons, they would have created an eſtate tail b implication to the nephew: Therefore, here it muſt be interprete an eſtate of inheritance to the ſons, whom he meant to take, it being deſigned for the ſons of the nephew, as before for the ſons o the brother. Then, whether croſs remainders? Now whatever applies to the nephew muſt equally apply to the niece. The word "for want of ſuch iſſue male," muſt apply to both (in the ſam ſenſe.) The remainder cannot take place till the limitations, bot to nephew and nieces, and their iſſue reſpectively, be ſpent. An by the following clauſe, "Then my will and meaning is, for wan "of ſuch iſſue, that *all my eſtate*, as aforeſaid, ſhall go to my nephew, *Barlow Scot*."

Therefore the nephew had a complete and entire eſtate in hi when he levied the fine, and ſuffered the recovery. An annuity i given to the nephew, *J. Barlow*, of inheritance to him, till he ſhal come into poſſeſſion: No ſuch annuity is given to *B. S.* Something may be argued from the difference of expreſſion; but the wi is ſo inaccurate, nothing, perhaps, can be well collected from that He has limited an annuity plainly to be as in tail, but yet withou mentioning time of payment, time of diſtreſs, whether rent annual or no. I ſhall cite but two caſes, *Robinſon* and *Robinſon*.

[Here Lord *Mansfield* interpoſed—Are they in the ſame words You have great luck, if you have found any ſuch; if not, you ha better confine yourſelf to the general argument; for it depends o the *preciſe* words.]

Mr. Serjeant *Walker*—I contend before your Lordſhip in favour of the plaintiff in error: (Defendant in ejectment) Firſt, that *J. Barlow* and *Catharine Fiſher* took an eſtate only for life. It is expreſsly limited during the time of their reſpective lives; and, after their deceaſe, to their heirs male, ſhare and ſhare alike; the elder to be preferred before the younger. And, for want of ſuch iſſue male, then remainder over to *Barlow Scot*. I contend, no ſuch general limitation has ever been interpreted a remainder over in tail. Now he can't have ſaid more clearly to the nephew and nieces for life only; the ſons to take as purchaſors. He then gives an annuity very ſtrongly to *Barlow* and his heirs, till he comes into poſſeſſion, which muſt be after his deceaſe. It's ſaid, he meant an eſtate tail, when he ſaid *heirs male*, and meant the ſame thing therefore when he ſaid ſons. I apprehend, the argument turns directly contrary.

I have no doubt, every ignorant man, when he uſes the words *heirs male*, or *iſſue male*, means preciſely the ſame as when he ſays *ſons*, and no more; but in the one caſe, the technical words overrule.

In the caſe of *Evans* and *Aſhley*, before your Lordſhip, your Lordſhip ſupplied the words, which, probably, were wanting here, if an eſtate tail were meant to the ſons. There was a remainder to unborn ſons, after an expreſs limitation in tail to the ſons born of the ſame parents, without the words to the heirs male, which your Lordſhip ſupplied from the intent, and which would here make the conveyance perfect.

Lomax and *Hatfield*, before Lord *Hardwicke*. The teſtator had a ſon, who had diſobliged him, and four daughters. He made a limitation for life, dependent on a truſt, to the ſon, when he ſhould attain the age of forty; remainder to the firſt and every other ſon; and, for want of ſuch iſſue, remainder over. [It ſeems Lord *Hardwicke* did not determine.]

I ſhall not cite the caſe of *Corrington* and *Hellier*, and only a very few others. *Humberſton* and *Humberſton*.

[Lord *Mansfield*—That was quite upon another principle; being upon a ſucceſſion of eſtate for life. As to the caſe of *Robinſon* and *Robinſon*, it was very different; the eſtate being limited to *one* ſon; that ſon died, and *another* was born. Queſtion not only, Whether he ſhould take by purchaſe, but whether he ſhould take at all; but from the intent of the eſtate continuing in the male line, the word "ſon" was taken as *nomen collectivum*, extending to *all* the heirs male.]

If your Lordſhip ſhould think there was no eſtate tail in the nephew and nieces, then the recovery was not good; if your Lordſhip ſhould think otherwiſe, I hope, you will not underſtand words ſo bare as capable of creating croſs remainders. The word "ſhare and "ſhare alike," are as ſtrong as if he had ſaid, "tenants in common;" the words "*reſpectively*" imply *ſeparate* eſtates, and therefore a moiety.

Serjeant *Walker*—Mr. *Mansfield* has reſted his *whole* argument on one point only; and it was the intereſt of his client. I have gone on all the circumſtances of the will. I have not ſaid that in all caſes where the *anceſter* has an eſtate for life, the ſons *can't* take an eſtate of *inheritance*; but that there is *no* appearance from the words here, that they can take without referring to the anceſter. In the firſt diſpoſition, it's for want of ſuch *iſſue* of his brother. In the ſecond diſpoſition, the words "for want of *ſuch iſſue*" can admit of no other conſtruction. All the caſes cited by Mr. *Mansfield* are where there is a *regular* eſtate *tail* but not carried on *far* enough, whether that defect can be ſupplied. This will be an anſwer to the caſe of *Evans* and *Aſtley*; what governed was the expreſs limitation in part, and a manifeſt intention to carry it on farther; of ſuch an intent the direction to take the arms and name of the family was a ſtrong implication. *Lomax* and *Hatfield*. Here they ſay, the ſon was on the face of the will in diſpleaſure with the father; therefore he was reſolved the eſtate ſhould not be veſted in him, and be derived from him to his heirs; but, there being heirs *capable* to take by *purchaſe*, they only carried the inheritance on farther, according to the plain intent. Whether there be croſs remainders nothing can be plainer. I don't reſt on the word "*all*," and yet, what can be ſtronger? No eſtate is to go over till *all* can go over, they never can die *without iſſue*, till failure of iſſue of *both*, becauſe they are *brother and ſiſter*.

Lord *Mansfield*—The queſtion is, whether *J. Barlow* the nephew took an eſtate for life, or an eſtate in tail. When a will is ſo untechnical and inaccurate as this, 'tis very dangerous to lay great ſtreſs on monoſyllables. *The beſt rule therefore, in this and every caſe upon wills, is to find the general intent*; and *then*, as much as grammar and language will *permit*, to interpret *particular* expreſſions accordingly. Here plainly there are different ſtocks whom he means to take.

As it was ſaid in *Corrington* v. *Hellier*, 'tis according to the common way. Limitation to the firſt and other ſons, the elder to be preferred before the younger, are the very technical words; then follow, and for want of *iſſue male* of *R. Barlow* [the brother] which is inaccurate, but the meaning is clear, the *ſons* are to take the elder preferred before the younger; does this only extend to the line of ſons living? The manifeſt intent was, the *heirs male* of thoſe ſons. And if I give the *anceſtor* an eſtate tail, then I defeat the *expreſs* words for he gives it to him expreſsly for *life*; intending evidently, that *no body* ſhould *defeat* the eſtate tail in the common way, the anceſtor having it in him. Then, as to the limitation to *J. Barlow* and *C. Fiſher*, why does it hold that the *ſons* can't take but through the anceſtor? And what does *iſſue male* mean? Plainly refers to what went before, but rejecting only the word *ſuch* 'tis very manifeſt, and even if that word were retained, (this is not indeed before the court) I ſhould ſay, the effect would *only be* that the *ſons* ſhould take for *life*, without any alteration as to the anceſtors. I am therefore clearly of opinion, that *J. Barlow* only took for life. The conſequence is judgment affirmed.

ON the ſtatute 30 *G.* 2. *c.* 24. perſons being brought up who were in cuſtody, on a charge of obtaining money under falſe retences; it appeared that they had ſold ſome goods to a cuſtomer who not liking them, they made a *conditional* ſale to another perſon: f the perſon who brought this proſecution ſhould not take them. The money was not returned, becauſe the goods were not abſolutely iſpoſed of.

Lord *Manſfield* obſerved, that it was ſurprizing how many abuſes ad been made of this ſtatute.

Indictment.

IT was ſaid, and the maſter ſeemed to think ſo, that two perſons could not be indicted for an aſſault againſt two, in one indictment: But Mr. Juſtice *Aſton* ſaid, this opinion had been held in *The King* v. *Clendon*, but that caſe had been over ruled, and the law was now held to be otherwiſe. Vide 4 Bur. 983—4.

Common Pleas.

Parker *againſt* Marſhal.

ON an application to oblige Mr. *Marſhall*, an attorney of the court, to deliver up the court rolls of the manor of *Wandſworth* and *Batterſea* belonging to Lord *Spencer*.

Lord *Spencer* appointed Mr. *Sutton* his ſteward; Mr. *Sutton* appointed Mr. *Marſhall* his deputy; and afterwards Mr. *Sutton* reſigned. Lord *Spencer* appointed Mr. *Parker* his ſteward; and Mr. *Marſhal* refuſed to give up the court rolls into the hands of Mr. *Parker*.

Strange and *How* was cited, in which, mortgage deeds were intruſted by a counſel into the hands of an attorney, and the attorney truſted them with the mortgager, who took up money upon them; the court ſaid, attornies ſhould be compelled to perform their truſt.

Another caſe cited from Serjeant *Wilſon*'s Reports, where an attorney, *quâ* attorney, was made liable though he acted as attorney of another court.

The difficulty with the court was, that Mr. *Marſhall* here acte as deputy and not as attorney.

A caſe was ſtated which induced the opinion of the court, that rule to deliver up the rolls might be granted. It was a caſe in whic Lord Chief Juſtice *Ryder* expreſſed his opinion, that an attorne ſworn of the court gains credit by that means, and is therefore liabl to a rule to rectify a miſconduct though not directly within his offic as an attorney.

But it was not thought that there appeared ſufficient, upon Mr *Parker*'s affidavit, to transfer the poſſeſſion of the rolls into hi hands.

Rule to ſhew cauſe why the court rolls of the manors of *Wanſd* *worth* and *Batterſea*, ſhould not be delivered to Lord *Spencer*.

Variance between Writ and Judgment.

IN writ of error the addition was eſquire, in the judgment gentleman.

Motion to amend the writ.

Writ of error, whether amendable.

Lord *Mansfield*—You never *amend* a writ of error; you muſt brin a *new* one. Is it not ſo?

Which was admitted. But Mr. *Buller* contended, the additio was not neceſſary.

Lord *Mansfield*—No writ.

Note, Addition may be in ſome caſes unneceſſary: But if it uſed, the party miſtakes it at his peril; for I think, it has bee determined, that it is never ſurpluſſage.

Afterwards, however, on looking into the ſtatute 5 *G*. 1. *c*. 13 it appeared, that writs of error varying from the record may b amended. And *leave to amend* was granted accordingly. *Sed vid* *infra*.

Information.

MOTION for leave to file an information againſt *Jame* *Dunn*, an overſeer of the poor in the pariſh of St. *John* th *Martyr*, for having offered a bribe of 5*l*. to a man, a ring, and th valu lue of a licence to marry a woman. That the man is a pauper f the pariſh of St. *Michael's*, and a widower, with four children: hat the woman is very infirm, and has been in the hoſpital. It ppeared, the offer was made in *June* 1772; but it does not ſay hen the marriage was, except illatively; that about the ſame time e overſeer ſaid, it was a bad thing, and he would not do it again.

COURT—You have ſtaid *three terms*; it will be a *great expence*: o to the GRAND JURY.

Notice of Ejectment.

NOTE, the reſolution of the court, with reſpect to the caſe of notice of ejectment, mentioned above, turned in favour of *icking it up on the door*, there being nobody to be found within. nd this was determined on the report of Mr. *Cowper*, as to the ractice.

Common Pleas.

Attachment.

NOT in the nature of an original, as of old imagined; and therefore does not require fifteen days from the teſte to the eturn.

IN the court of Chancery, diſtinction taken notice of between heir *apparent* and heir *preſumptive*. Heir *apparent* is he, who, in he courſe of law, *muſt* be heir, if he ſurvives his anceſtor, as the *ldeſt* ſon. Heir *preſumptive* is he who has the preſent preſumption n his favour, that he will be heir; but which preſumption may be *xcluded* by the intervention of ſome body who has a *nearer* title. Thus, a nephew may be heir *preſumptive*, but not heir *apparent*. Thus, a daughter is heir *preſumptive*, before a ſon is born, but not eir *apparent*. The moſt *remote* relation of the whole blood may e heir preſumptive; but the heir apparent can only be he who, if ot diſinherited, or dead before his anceſtor, muſt take of courſe, ecauſe it is impoſſible any other ſhould be *nearer*, or ſo near to the nheritance.

Diſtinction between heir preſumptive and heir apparent.

—— Parkes.

ON a motion to diſcharge defendant out of cuſtody, for want of being charged in execution within two terms.

The caſe was, the marſhal had *two* perſons in his cuſtody at the ſame time, *both* of the name of *Parkes*. And the rule being, to bring the defendant, naming him by his *ſurname* only, or acknowledge him in cuſtody, the marſhal acknowledged *Parkes* to be in his cuſtody, and the plaintiff proceeded regularly, as he thought, to charge the defendant in execution. It happened, that the term before that the defendant had removed himſelf into the cuſtody of the warden of the *Fleet*; ſo that the other *Parkes* had been miſtaken in the proceedings for the *real* defendant.

It was contended, that the marſhal not being *intentionally* wrong, and they having proceeded *literally* right as to the name, and *intentionally* right as to the perſon, though in point of *fact* they were *formally* miſtaken; that therefore the defendant ſhould not take advantage; and that in a caſe of *Steward*, if a treaty could have been made out to the ſatisfaction of the court, they would not have diſcharged the defendant, though the time had elapſed.

On the other ſide, it was ſaid, that a treaty and agreement being a waivure on the part of the defendant's ſelf, there was a great difference. And it was ſaid, that all theſe rules admitted of liberal conſtruction. (Which, however, is not altogether true; *nam in gratia delicti facienda liberalitas; in pœna irrogandâ non item, verſatur.*)

Lord *Manſfield*—There is no doubt in this caſe: There muſt be exceptions to the *literal import* of *every* rule. It was to prevent *neglect*, and the party *ſuffering* by that *neglect*, that the rule was intended. *No* ſuch thing has happened. This has been a ſlip, if I may ſo ſay, in the practice of the court, by not inſerting the *chriſtian* name of the defendant: And whether the *plaintiff* ſhould *ſuffer* by this motion, or the marſhal, the rule of this court would work *monſtrous injuſtice*.

This rule is conſtrued *very ſtrictly* in general; but there are *exceptions*. Why is an *agreement* excepted? It is not by the *literal* words of the rule. Why is an *impoſition* excepted? There is no *ſuch* exception on the *face* of the rule.

It was objected, the party would be detained in cuſtody all the long vacation; but this, on the circumſtances of the caſe, it appeared would *not* happen.

Ungrammatical Words in an Affidavit.

OBJECTION to the words of an affidavit, that they contained no denial.

The words were, that they, the deponents, *nor* any of them, *never* received.

Lord *Mansfield* held, that the meaning was *apparent:* And that f they had received notice, the *form* of words would never bring hem off on an *indictment* of *perjury*.

Writ of Error.

THE variance in the writ of error, in the caſe lately before the court. Lord *Mansfield* took notice, that it was the ſame to hem as if it had been *none*; for that by the 5 *G.* 1. *c.* 13. writs of rror, where there was a variance, were to be *amended* into the *court* nto which they were *returnable*; which was in this caſe before the ORDS in PARLIAMENT, where it would be amended of courſe. hat therefore the juriſdiction of *this court* had nothing to do with t.

RULE DISCHARGED, as to the *amendment of the writ, without oſts.*

Upon coſts applied for, Lord *Mansfield* ſaid, Would you have he *court* pay them? I am ſure, if they are to be paid, it was the ourt in this caſe who ſhould have paid them.

Mr. Juſtice *Aſton* this day, being the twenty-firſt of *June*, gave CHARGE to the GRAND JURY, ſtating the importance of their ruſts, both to *individuals* and the *public*; particularly as to that part which concerned the *ſuppreſſion* of *diſorderly houſes*, and thereby ſtopping the *firſt ſource* of the moſt *ignominious* and *fatal vices*.

Action of Debt for double Rent, on the Statute.

TWO hundred and forty pounds claimed, for two year's double rent, as a *penalty* for *overholding* premiſſes, at ſixty pounds *er annum* in value.

Verdict and judgment ſtated, that the plaintiff ſhall recover one undred and eighty pounds.

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* Mala grammatica non vitiat chartam.

Contended, that this being a *fixed* debt, the plaintiff muſt recover the *whole*; or the verdict is found *againſt* him for the *whole*.

Another objection, that the *habendum* in the leaſe is *from the fir of June*, for three years, and notice to quit is *on the firſt*.

Lord *Mansfield*—*From the firſt of June* then is, that *on* the *ſecond* of *June* the *tenancy* begins, and *holds to* the *firſt*; therefore declaration *good*.

Againſt this the following caſe, with another, was ſtated; *Lewellyn* againſt *Williams and others*, *Cro. Ja.* term *Mich.* *anno octavo*, in *B. R.* Ejectment. Leaſe on the twelfth of *December*. *Habendum a primo die*. Jury found a leaſe, *dated* the *firſt* of *December*, (*habendum* from *henceforth*) but *delivered* on the *twelfth*. Court held, it ſhould be taken from the day of the date, and from henceforth are one, being a computation from time *paſt*: But they ſaid, a leaſe of the firſt of *December*, *habendum a die datus*, ejectment canno be alledged the *ſame* day.

Lord *Mansfield*—The *only* difference is, you begin from the *wrong* end; you ſtate a caſe which relates to the *commencement* of the term.

As to the other objection, it was *likewiſe diſmiſſed*, and it was obſerved, that the defendant, to the declaration of the plaintiff, plead *nil debet*; that is, neither the *whole*, nor any *part* thereof. By which he puts himſelf on the jury, to try not only whether the *whole* b due, but whether any *part* be due: And therefore they may fin againſt him for a part.

Third objection, that whereas the jury had found one hundre and eighty pounds, for the *double* damages of a year and an half expreſsly, this was an error in the computation. Diſmiſſed alſo immediately, as being an evident error of computation in the objector to ſuppoſe this an error in the jury.

Pariſh of Bething.

AGAINST an order of ſeſſions, by which an order of tw juſtices to collect a ſeparate rate in the tithing of *Newburn* had been quaſhed.

The order of the two juſtices was upon the 13 & 14 *Car.* 2. an upon the ground, that the inhabitants of the tithing were *unable* t receive any benefit from the ſtatute of *Elizabeth*.

I

It was argued by Mr. *Dunning*, in ſupport of the order of the wo juſtices, that the 13 & 14 *Car.* 2. provide for the ſeparation of ſuch pariſhes as, by reaſon of their largeneſs, cannot receive benefit from the ſtatute of 43 *Eliz.*

Objection againſt the order of ſeſſions, that the pariſh which the order had conſidered, had in fact received ſome benefit, and was therefore not within the ſtatute.

Mr. *Dunning*, on the other hand—That the legiſlature, if they were applying a remedy to a miſchief which did or could exiſt, muſt only mean *ſuch* an one, as where the churchwarden could not conveniently perform his duty with the reſt of the pariſh officers, nor the pariſh conveniently come at them. For *no* pariſh, take it o be as *large* as to fill a *county*, or even as large as the *kingdom*, can have ever been in the ſtate of *not* receiving the *benefit* of the 43 of *Eliz.* at *all*. Taking this to be a meaning that ſuch a pariſh was meant, as where the churchwardens could not *conveniently* perform their duty, nor the pariſh conveniently come at them, that then ſcarce could there have exiſted a caſe, to which this meaning was more applicable than that before the court. For that this is ſtated to be a *little inſulated* tything, *twenty miles diſtance* from the *pariſh*. The pariſh officers can't very *conveniently*, (performing their duty as they do, *without reward*, and without any need of *increaſing* the difficulty) they cannot very conveniently go *twenty miles* to *collect*; nor the pariſh ſo far to attend them.

That the meaning of the order, in ſaying, the tithing could not conveniently receive the benefit, is explained by the *ſituation* of the *place*, and the only conceivable intendment of the ſtatute.

That even if theſe words had *not* been in the order; but they had *poſitively* declared, that the tithing *could not receive* the benefit; there would ſtill have been no ground, upon ſuch declaration, againſt their order.

That the utmoſt that can be objected againſt theſe words is, that they are *unneceſſary*; for that the ſtatute ſhews plainly what was conſidered and provided againſt. Some pariſhes, by reaſon of their ſituation, could not receive the *full* benefit of the 43 *Eliz.* and this only was or could be in contemplation, if any thing was meant; and the proviſion was, that thoſe who, by ſuch circumſtances, were in a *worſe* condition than *other* inhabitants, though it was *impoſſible* they could have been *totally* out of the benefit, ſhould be put on the ſame footing.

That

That the propoſition, thus maintained, appeared ſo ſelf-evident, or at leaſt ſo clear, when entered into, that the only thing that ſeemed requiſite to prove, was, that it had not already been otherwiſe decided. That there had indeed been ſeveral *dicta* preſerved in notes; but that there had been abſolutely no ſolemn deciſion, nor even any thing militating ſtrongly againſt this interpretation of the ſtatute. As to the *King* and *inhabitants of St. Giles's in the fields*, that there the determination, though this caſe had been often agitated, was, that a ſeparation being ſtated of the inner diviſion of St. *Giles's*, the court ſaid, *non conſtat*, this is a new term, and we know of no ſuch diviſion. That ſomething more *paſſed* in *converſation* amongſt the judges, but *no deciſion*. That the pariſh of St. Giles's is nothing in compariſon of that in queſtion, as to extent.

That in the caſe of *Peeton* and *Weſtgard* there was no ſtating that the pariſh could not receive the benefit; that it appeared for 123 years they had in fact received it. That it is ſtated there that Lord *Mansfield* ſaid, in his judgment, that "the policy of the ſtatute of "*Car.* 2. was bad: That the diſtricts ſhould rather be *enlarged* than "*diminiſhed*—and that inability ſhould have been proved; that none "was proved, but the contrary." That in this declaration his Lordſhip was thoroughly juſtified; for that it appeared they had the full benefit, and had *always* had it. That as to what was to be inability, the court had at that time no occaſion to go into it: And therefore, Mr. *Dunning* ſaid, he preſumed it was ſtill open to him to underſtand this caſe as not againſt him; and that it is the only one of any authority. That therefore, he thought himſelf ſtill at liberty to hope his Lordſhip's concurrence, to ſupport him in the interpretation of the ſtatute of the 13 & 14 *Car.* 2. ſo as to make it applicable to what is poſſible and eaſily conceivable, inſtead of what, in his ideas, was by no means either.

That, on theſe grounds, he begged leave to conclude, there was *nothing* in the order by which it *appeared* the juſtices had been *wrong*; and then, that he ſhould only aſk the uſual rule of the court to be applied, that nothing *wrong* ſhall be intended againſt the juſtices, *which does not appear*.

That he had omitted to obſerve, that there is another objection, namely, that a *tithing* is no word within the *deſcription* of the ſtatute. That to this he ſhould reply briefly, and content himſelf with ſaying, that diviſion, the word uſed in the caſe of St. *Giles's*, and in the objection, is (as he doubted not the court would anticipate him in ſaying) a *very vague* word; whereas *tithing* is a very *definite* one, and muſt *conſiſt* of no leſs than *ten* houſes, with the *proper* officer.

On the other ſide in ſupport of the order of ſeſſions, by which e order of juſtices was quaſhed.

That it is admitted the juſtices order is proper in other reſpects; t that there is a queſtion, whether the diviſion was created *before* *by* this order. That it does not appear that the overſeers were ade to act for this tithing as a ſeparate diviſion; that it was appreended the two juſtices *ought* to have *ſtated* this; and that 'till it *as* done there was *no* diviſion.

In the caſe of *Weſtgard* it was ſtated, that the pariſh of *Stanhope* the county palatine of *Durham*, had a joint appointment—the oney levied by another aſſeſſment—that it had *four diſtinct* quarrs—that it was twenty miles in length, and eight, at a medium, breadth. After this an order was made to ſeparate this quarter, d removals were made, and appeals from one quarter againſt anoer.

That the caſe was *twice ſolemnly* argued. That Lord *Mansfield* eclared, that the policy of the ſtatute was *miſtaken*, that the diſicts ſhould rather be *enlarged* than *diminiſhed*. That afterwards his ordſhip ſaid, but not as neceſſary to the deciſion, that the inability hould have appeared.

That Mr. Juſtice *Wilmot* had ſaid, he was of the *ſame* opinion s to the *firſt*, and that one hundred and twenty years had *proved* hey were not under inability; and that the ſubſequent forty years ractice could not alter the uſage.

That, in the caſe now before the court, there had been an acquiſcence of fifteen years only; in the other of forty.

That Mr. *Dunning* had ſuggeſted, there was a difference of opiion about the policy of the ſtatute, but that on the caſe it apeared, that his Lordſhip and Lord Chief Juſtice *Wilmot both* conurred, and that no caſe was ſtated in which it was affirmed to be therwiſe.

That to prevent uncertainty of ſettlement, multiplicity of officers, nd encreaſe of expence, the contrary to the policy of that ſtatute would be neceſſary; for the more you ſeparate pariſhes, the more ou multiply officers, and encreaſe the burthen of rotation and the ifficulties of the poor. That an order of 1758, which had been ſtated, was a mere order by conſent, and as ſuch given up by the ounſel, and that there was nothing elſe to ſupport the order of the uſtices.

Lord *Manſfield*—There *cannot* be ſo *clear* a caſe. Without entering into the *general* argument, what was the order of ſeparation? is a mere *nullity*. It does not appear there were *any* overſeers appointed; but it appears *negatively* there were no overſeers 'till 1772 which does by *no* means *conclude* the court to ſay there were *an* appointed, *even then*.

Mr. Juſtice *Aſton*—There is no need of entering into the queſtio whether the *policy* of the ſtatute is good, or not; but it muſt appea *clearly*, that the pariſh was not *able* by reaſon of its *largeneſs* to receive the benefit of the ſtatute of *Elizabeth*; there is no ſuch thin ſtated here; there was *nothing* to create a *ſeparation*, but a *mere orde* by *conſent*, upon which *nothing* was *then* done; nor appears to hav been done to *this* time; it was on a propoſal between the owner o this tithing and the pariſh officer of *Beething*.

As to what was ſaid about the ten houſes it does not appear; no can we infer there were more than ten. And this inconvenience ſtated as general, I dare ſay affected Mr. *Smart*, the owner of th tithing, and perhaps, no body beſides.

Curia conſenſit unanimiter.

RULE made ABSOLUTE to *quaſh* the ORDER of JUSTICES, and *confirm* the ORDER of SESSIONS.

Attorney.

ON a queſtion, whether an attorney might be bail; it ſeems the objection was held to be reſtrained to the court in which he was attorney; *ſed de hoc quære ulterius etſi non immerito videatur.*

Penalty.

RULE; *never* to take out *execution* for a *penalty* upon money to be paid by inſtallments; you muſt *never* take out *execution* but upon the money *actually* due: Therefore the jury *often* find what is *really due*. Lord *Manſfield*.

Habeas Corpus.

A Man brought up by *habeas corpus*, who had been committed for a felony in violently aſſaulting and robbing *Mary Hill* on the King's Highway. *Notice* had been ſerved on *Mary Hill*, that

the

court on ſuch a day would be moved, *&c.* But notice was not ved on the *committing* juſtice.

The court ſaid this notice was *ſhort.*

The woman did not appear.

Lord *Manſfield* ordered the priſoner to be *remanded,* as not enled to *bail,* being committed not on *ſuſpicion* of felony, but on *exſs* charge of felony on the face of the warrant; and therefore not be bailed unleſs particular circumſtances had been ſhewn.

Bail.

ON it's being objected againſt a perſon that he ſtiled himſelf gentleman, when he had a commiſſion in the *Birmingham* ay—Lord *Manſfield*—Is no man to ſay he is a gentleman who deals commiſſion?

Bradley Clerk of the Peace.

ON a queſtion, whether the clerk of the peace taking an aſſignment under the act of inſolvency, the aſſignment ſhall go to is heirs, ſubject to the proviſions of the act, or to his ſucceſſors.

Lord *Manſfield*—Whether the clerk of the peace took officially not *regularly* before the court. However there can be no doubt; gives to the *clerk of the peace,** not to *him and* his *heirs.*

* Nomine officii.

Another queſtion, whether the aſſignment ſhould not have been deed *indented* and *inrolled?*

Lord *Manſfield*—I ſuppoſe there is a purchaſer which makes this pplication ſtill more *improper,* if an agreement is *depending.* If an greement has been made *actually,* bring your *action,* and the court ill give a *ſolemn* opinion.

Inſolvent Debtors.

ON the act of 32 G. 2. for the relief of inſolvent debtors; the court did not receive the petition for want of notice to the laintiff.

Evidence.

ON a motion to enlarge time of trial, on account of the abſence of a material witneſs.

It was on a caſe which aroſe abroad. The diſpute was about quantity of rum, and whether the rum was the plaintiff's privat property, or belonged to the owners of the ſhip. It was ſaid, th ſecond mate of the ſhip was the only perſon who could *prove* thi point: And they refuſed to admit an entry made by the ſecond mate, in proof of the matter.

Lord *Mansfild*—If the witneſs was *dead* this evidence would *certainly* be *good*. There uſed to be thought a difference if he wa *beyond* ſea; but I ſee *no reaſon* for the difference, *unleſs* it ſhould appear the witneſs is *coming home*. This *is not* the caſe of a cauſe *ariſing* in *England*, and the *witneſs* goes *abroad*. *We* will *therefore* though in the common caſe we enlarge only for one term, *enlarg* in *this* caſe in *infinitum* if the witneſs *cannot* be come at, and they refuſe on the other ſide to admit reaſonable evidence.

Goodright on Demiſe of Roffe *againſt* Harwood.

A ſummary Note of the Arguments, in the Queſtion of Revocation with the Opinions of the Judges more at large. C. B. 21 June 1773.

THIS was an action of ejectment, to recover chambers i *Lincolns Inn*. On a ſpecial verdict, the jury found a wil made by Mr. *Lacy* in 1748, (whereby the defendant claims) and they find, that he being ſeized, *int. al.* of the chambers, and alſo being intitled, by virtue of a marriage ſettlement, to certain lands ſold, and the money to be employed in the purchaſe o other lands to the ſame uſes, but which money is not as yet laid ou in the purchaſe of others, did by his will, bearing date as above deviſe as follows. I give, bequeath, and deviſe, to my dearly beloved, friend Mrs. *Mary Harwood*, all my real and perſonal eſtate whatſoever and whereſoever; and I further will and deſire that ſh pay the following legacies; [they then find a ſmall one to his niece the plaintiff, who is heir at law, and two other legacies in the uſua manner to ſervants] and that afterwards in the year 1756, he mad another will in writing, ſigned by himſelf, and atteſted by thre ſubſcribing witneſſes, whereby he made a different diſpoſition; bu in what particulars on their oath they know not; and they furthe on their oath ſay, that they do not find that the teſtator cancelled

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r defendant deſtroyed it; or what is become of it, they know not, nd conclude in the uſual form, praying the judgment of the court, whether this be a revocation; and if it be, they find for the plaintiff; f otherwiſe, for defendant.

The firſt will was in evidence on the trial.

It was argued by Serjeant *Burland* for the plaintiff, and Serjeant *Davy* for the defendant.

Serjeant *Burland*—That as the deviſee cannot be to take the ame intereſt as in the firſt, ſhe was to take none at all; for every hing had been given her by the former will, except 2 [or 3] trifling egacies; and if ſomething was taken away from her by the latter, he former and latter could not ſtand together.

Serjeant *Davy* for defendant—That there muſt be *animus revocandi*; that no accidental deſtruction of a will would ſet it aſide. That a will cannot be revoked without either expreſs revocation, or contrary appointment. Serjeant *Burland* in his replication, cited *Howard* and *Howard*—1 *Vez.* 179. Lord *Hardwicke* ſaid, the ſettlement in that caſe very providentially revoked the will, though the uſes could not take effect.

Serjeant *Davy*—That in the caſe of Lord *Angleſea*'s will, the Houſe of Lords was of opinion, that two wills and ſeven codicils made one entire will. In the caſe of *Hitchin* and *Baſſet*, 1 *Shower*, an iſſue had been directed out of the Exchequer upon a bill of the heir at law's bringing; a revocation was found; Lord *Hales* ſeemed to have been much diſſatisfied; another iſſue was directed; the jury find ſpecially a latter will, but do not find he has deviſed any lands. Court determined, a revocation did not appear; for that it was not found any lands paſſed, and therefore it ſtood indifferent.

Lord Chief Baron *Hale* indeed ſays, where there is a ſecond ſubſtantive independant will it operates a revocation, by conſtruction of law, though there is no expreſs revocation; but it may be otherwiſe here; and it does not appear but it might be a confirmation.

3 *Mod.* 203. 4 *J.* 2. *K. B.* In ejectment: Special verdict, that Sir *H. Killigrew*, [on whoſe will the queſtion before the Exchequer] in 1644 made a will; in 45 he made *aliud teſtamentum*, but what was contained therein the jurors are altogether ignorant: Judgment four years after, in *K. W.* for the plaintiff; judgment affirmed in the Houſe of Lords.

Vide *Salkeld* 592. Where, in the ſame caſe, the court was of opinion this was no revocation, but might concern other lands, no lands at all, or might be a confirmation of the former. Here Mr. *Lacy*, 1748, deviſed his real and perſonal eſtate to the defendant; and ga directions to her for the payment of legacies. That, in 1756, made another different, but what it contained they do not know and they do not find that teſtator cancelled, or defendant deſtroye it; they do not know what is become of it. I might contend, th this part of the finding is repugnant, and therefore void; for if the never ſaw they had no legal evidence; if they did, how could the find a different diſpoſition, and yet not know in what.

(It was objected from the bench—What if they had been to by an attorney who drew the will, that he meant a different diſp ſition?) Serjeant *Davy*, Sir, that might have been ſomething, b they ſay no ſuch thing.

Objection from the bench. Yet the jury is not to find the ev dence, but the fact, and give their judgment upon it

Serjeant *Davy*—But my Lord, it would have gone no farth than evidence of meaning, and not a will actually made.

Now as to the point of revocation. It was ſaid, and the ſame a gument ran throughout, that every latter will revokes a former. 'T true in words; but, I ſay, to revoke a good will is required that th latter be inconſiſtent with the former; or revoke it in expreſs word So that all the arguments uſed by *Pemberton*, *Maynard*, and tho great men, from *Swinburne*, *Godolphin*, and *Coke*, are merely foun I own that where an act is done irreconciliable, or inconſiſtent, 'tis a revocation.—As if he make a will to a perſon incapable of taking though this be void, 'tis a revocation of the former by the plain i tent: And ſo if a feoffment be made without livery. But if the are two wills conſiſtent, both ſtand, and ſhall be but one will a inſtrument, and operate jointly as the whole laſt will of the teſtato Every ſeveral deviſe is in like manner the will of the teſtator. give my real eſtate to *A*; this is his will: I give ſo much of perſonal to *B*; this is his will; And thus be there ever ſo many pa ticular deviſes, without regard to difference of time or inſtrume containing them, all taken together conſtitute his complete laſt wil nor ſhall any be defeated on account of thoſe which are ſubſequen unleſs for manifeſt repugnancy between them.

But 'tis ſaid, if there are two wills without dates, neither ſha ſtand, that is, if the one be inconſiſtent with the other; but othe wiſe, both. *Coward* and *Marſhall*, *Cro. E.* the court determine where there were two wills that both might ſtand; though the te tator had married between the one and the other; and this, thoug there was a manifeſtly different diſpoſition between one and t ther; [and that a material one] ſince they were not contradic-ory.

It ſeems then, that there may be different inſtruments, both of hem conſiſtent, and both ſhall ſtand. A man makes a partial iſpoſition, as of his lands in the province of *York*; he may make nother of his lands in the province of *Canterbury*: If he makes a ill afterwards contradictory to either of the former, which ſhall it evoke? Only that to which it is contradictory. On the words *aliud ſtamentum*, it was contended in the caſe of *Hitchen* and *Baſſet*, that muſt be another detached from the former, and therefore, as being he laſt, defeat the operation of that which preceeded; but this failed n the principle already maintained, that every part of a will is the eſtator's will; and the whole collectively his laſt. Perhaps, the eſtator might have a doubt as to the effect of his former will on he lands converted into money, which were to be reveſted in land; or if a man gives all his real and perſonal eſtate, and afterwards ays out money in lands, neither the lands will paſs nor the intereſt n equity. A caſe was mentioned 2 *R.* 3. *fo.* 2. where a revocation vas held, becauſe a different executor appointed.

I think, whether a revocation or no revocation is matter of fact, nd muſt be left to the jury; it was the very iſſue in Sir *H. Killi-rew's* caſe; as whether a man guilty of murder, or felony of any ther kind—theſe are technical legal terms, in which the jury fre-uently find the complicated fact, together with the matter of law eſulting from it. [I think Serjeant *Davy* intended to intimate, that rom the imperfection of the finding on the ſpecial verdict, the court vere left in uncertainty, and that as they had not taken upon them o find generally, at leaſt a *venire facias de novo* would be proper. *ed qu.* what more particular? I ſhould almoſt incline to think the ury, from what Serjeant *Davy* ſaid, had found that he made a ſe-ond will, but did not revoke the firſt, (as meaning not in terms) and hen left the title to court.

Objection from the bench—Suppoſe the jury had found thus, " that teſtator had made a ſecond will, whereby he revoked the " former;" would not this have been open to the court, upon the ircumſtances; like other legal terms, on the effect whereof the ourt judges [I think, this was ſubſtantially what was obſerved. *ed qu.*].

The court took a diſtinction and ſaid, " where the inſtrument is " complete, that revocation or no revocation is matter of law, be" fore the court; but where the inſtrument is imperfect, by reaſon " of interlineation, there the jury are to find.

Serjeant *Davy*—I proceed to a ſhort caſe or two farther.—Suppoſe the jury had found the will totally different; but that it did not exiſt at the time of Mr. *Lacy*'s death: Then I contend there was no need of republication of the firſt will; but the will, which alone exiſted at the teſtator's death, ſtands; and the other was a nullity. In the caſe of *Glazier* and *Glazier*, before the court of *K. B.* the teſtator made a will; afterwards he made a ſecond, effectually revoking the former: This will he afterwards cancelled. The jury find all this matter: The court, on very ſolemn deliberation, held, that the cancelling of the ſecond will was an immediate republication of the firſt. I am willing to anſwer all that has been ſaid by my brother *Burland*, out of reſpect, as not chooſing to paſs over any thing he has ſaid: If I have done otherwiſe, it has not been intentionally. I beg leave to conclude with this obſervation.

Though the jury have in this caſe believed the witneſſes, and found that another will was made, it may be of dangerous conſequence to encourage the conſtruing this as a revocation of the former, without knowing the will itſelf; as there will be no ſecuring a will, if another will may be ſet up as a revocation, without any neceſſity of ſhewing the will itſelf. The legiſlature has taken great pains by the ſtatute of frauds, which will be made ineffectual. The caſe of *Killigrew* was before the ſtatute, and very probably occaſioned that part of it which relates to wills. The court ſeemed to doubt, whether the ſtatute meant not that the ſame authority, the evidence of the inſtrument, ſhould be neceſſary for revocation as for making. However, it was obſerved, that deeds and acts of parliament may be ſupported on parol evidence, if proved to be loſt.

> *Note*, The caſe in 10 *Co.* 94, with the reaſons there laid down, ſeems very worthy of obſervation, eſpecially as to the neceſſity of ſhewing the deed itſelf, unleſs that be proved impoſſible; and if it be, the ſame reaſons may ſeem to hold ſtill ſtronger, for a full finding of contents at leaſt.

Serjeant *Davy*—Suppoſe a will made two days before the teſtator's death; and the jury find the making of this will, and that, *inter alia*, there was ſuch a deviſe; but whether it was in being at teſtator's death, or what elſe it contained, they are totally ignorant.

Mr. Juſtice *Blackſtone*—It ſeems of conſequence that, for ought appears, the ſecond will may exiſt now.

Serjeant *Davy* applied the maxim, *de non apparentibus & non exiſtentibus eadem eſt ratio.*

Serjeant *Burland*—If my brother *Davy*, who has contended againſt the finding as void, could get rid of another objection, I ſhould be very little ſolicitous about the reſt: It is that, *ex vi termini*, a different diſpoſition muſt be taken to be an inconſiſtent one; and why a different will, except to make a different diſpoſition. He contends, however, that there was no poſſible evidence: But your Lordſhips have given in great part, indeed entirely, an anſwer; and the court will ſuppoſe the jury have found on complete evidence: Parol evidence may be admitted of the contents, undoubtedly. Every will adding to the former would not be a revocation; but inconſiſtency in any part is a revocation.

The court ſeemed to be very clear, that lands converted into money, to be reveſted, were a part of the realty, and the money would paſs as lands, under the name of real eſtate: And ſo, I think, there has been a very late authority.

This queſtion afterwards came to be adjudged *Hilary* term, fourth *February* 1774.

Mr. Juſtice *Nares*—This was on an action of ejectment, of chambers of Mr. *Lacy*, on the demiſe of leſſor of the plaintiff.

The ſpecial verdict ſtates, "That Mr. *Lacy*, being ſeized of cer-
" tain lands, by virtue of a marriage ſettlement, which lands had
" been ſold, the money was to be laid out in the purchaſe of other
" lands; and being entitled alſo to chambers in *Lincoln's-Inn*,
" made his will in 1748, as follows: I give, bequeath and deviſe
" to my dearly beloved friend, Mrs. *Mary Harwood*, of *Maiden-*
" *lane*, all my real and perſonal eſtate, whatſoever and whereſoever:
" And I further will and deſire, that ſhe pay the following legacies;
" to the teſtator's niece 300*l.* and two other bequeſts, in the uſual
" manner, to ſervants."

The verdict proceeds to ſtate, " That Mr. *Lacy*, ſtill entitled to
" the eſtates, in the purchaſe whereof the money was to be laid
" out, did make, and duly publiſh, another teſtament, in writing,
" with three ſubſcribing witneſſes: And the jurors on their oath
" ſay, thereby he made a different diſpoſition; but in what reſpects
" the jurors know not: And that they do not find that teſtator can-
" celled, or defendant deſtroyed it; or what became of it they
" know not."

I ſhall not trouble the court with the infinite number of caſes concerning revocations, but only that of Sir *H. Killigrew*'s will, reported in *Hardr.* 3 *Mod. Salkeld*, and *Shower*'s P. Caſes; in which I ſhall uſe the opinions on both ſides in my opinion on this caſe: On which I will firſt obſerve, there is evidently a title the leſſor, as niece, and, by the circumſtances of the family, he at law of the teſtator. The heir at law is greatly favoured in jud cial deciſions; and the maxim holds, *melior & fortior eſt diſpoſitio le quam diſpoſitio hominis.* No conjecture or implication, other th neceſſary, will be admitted; and revocations, being conſidered as mitters in favour of the heir, are introduced on circumſtances, a by legal operation, *invito teſtatore.*

Maxim.

Therefore *Owen* 76, a man, fearing he was only tenant in ta ſuffered a recovery, in order to enable his diſpoſition in fee: But th recovery bars his will. In another caſe, where a man was about make a feoffment, but being told it would hurt his will, ſaid would not, yet did, by advice afterwards, on perſuaſion it would n prejudice his will; as far as livery and ſeiſin had gone, this avoid the will. And in the *Roman* civil law, whence all our notions teſtamentary diſpoſitions, the favour to the heir was carried muc farther: Therefore a will made, where parents, ſiſters, or brothe give nothing either to the other (for it was reciprocal) was term *inofficioſum teſtamentum,* and concluded inſanity. But afterwards th relaxed, or at leaſt evaſions were found; and therefore *quantacunq pars legata* ſaved the complaint of *inofficioſum teſtamentum.* Wh is here ſet up in bar? A will, againſt which another will is foun on the verdict.

Nor is it to be objected, that the heir does not ſhew this ſeco will; or that, for default of proof by the heir, that it does n make equally againſt her; ſhe ſhould therefore fail of ſupport her title. No man ſhall be bound to ſhew that deed whereto he a ſtranger, and neither claims any thing comprized therein, nor right of one claiming under it. And this is held 10 *C.* 94, a *Brook monſtr. de fait.*

Neither does it lie upon the heir to plead it otherwiſe than gene rally; and accordingly *Plowd.* 410, by all the judges, a party any title or bar ſhall not be obliged to plead more than makes f himſelf. A man may plead a feoffment generally, though up condition, without pleading the condition. And therefore, ſupp *ejectione firmæ,* a deviſe pleaded; you make your replication on t ſtatute of mortmain. To this, in replication, the plea muſt be the ſaving, or that the deviſe is to the univerſity. Suppoſe this *ejectione firmæ:* Plaintiff claims as heir; defendant ſets up a la will: Plaintiff, in his replication, that it was not a laſt will; he not bound to ſhew more: But ſhe muſt ſhew, either that the ſecon will was defeated, or elſe that it is a confirmation of the firſt; ſo f at leaſt as ſhe herſelf is concerned.

In the caſe in *Croke E.* 721, the ſecond will was adjudged not a
vocation of the firſt; becauſe, on comparing them, it appeared
ey both very well were conſiſtent. But it is incumbent on the
viſee, claiming under the firſt will, to ſhew the ſecond is conſiſ-
nt with the firſt: For, *prima facie*, it appears otherwiſe; a codi-
, and not a will,. being the proper inſtrument to vary; and a will
s a complete inſtrument) naturally intending a revocation of any
rmer will, till the contrary can be proved.

Nor do I apprehend it is neceſſary that the jury find expreſsly in
ords, a revocation, if they find ſuch circumſtances as amount to
e in law. 2 *R.* 3. *Lex revocat in ſe.* And neither need fraud **Maxim.**
found expreſsly on the verdict, if it be plainly apparent on the
atter found; as in the caſe of *Oliver* and *Robertſon*, laſt term; for
facto oritur jus. In the caſe of *Killigrew*, the jury did not find
hether there were any lands at all deviſed; and the court held it
material; for had they not ſaid ſo, the court would not have pre-
med it. But as they did, the finding was not the worſe. At the
ſt, Mrs. *Harwood*'s claim did not appear certain; the jury doubted
leaſt whether it was not defeated by the ſecond will: And even
if they are uncertain whether her entire intereſt, or any part of
remained by the ſecond will, the conſtruction will neceſſarily be
the negative; *quoties cunque juratories dubitant an aliquid ſit per-*
de eſt ac ſi non eſſet. For, if they don't find any thing in her
our, *de non apparentibus & non exiſtentibus eadem eſt lex.* But it
ſaid, the finding is inconſiſtent; the finding cannot be otherwiſe
the evidence. The teſtator ſaid, "However ſhe might think ſhe
ſhould take every thing, ſhe was d—— bly miſtaken." Now ſhe
s general deviſee, under the firſt will, nor can ſhe lay claim to the
ambers, unleſs they find them expreſsly deviſed.

If a doubt remains, whether the will exiſts, as I cannot but think
does, or ought, then, *in dubiis non præſumitur teſtamento.*

If the will ſhould be found, I think the lands may deſcend in the
an while, as 9 *E.* 4. 26.

This I ſay, without relying on the maxim, that a complete
ll is *ipſo facto* a revocation of the firſt: And where there are two
lls without a date, both are void; becauſe one is ſubſequent:
d, which ever it be, it revokes the former.

There is almoſt every thing. The will muſt be preſumed to be
eadem re, 1 *Shower*, 49. The diſpoſition ſhall be preſumed to
fer in the general, and not only in particulars.

But it was ſaid very ably, at the bar, that the court muſt look in- to the will; and the entries are *quibus lectis & auditis*; that is where they are to decide upon particular premiſſes, between deviſees, or on the whole will; but here, it makes againſt the defendant.

The chief juſtice ſaid, in *Killigrew*'s caſe, "We cannot fancy ſ "and ſo." However, they found at laſt they were obliged to fancy ſomething. And Serjeant *Pemberton*, in that caſe, ſays, "If ther "is to be a preſumption, it ſhall be in favour of the heir at law."

But what is the effect on the ſtatute of frauds? In *Carth.* it i ſaid that a feoffment may operate as a revocation. And *Darley* an *Darley*, [*C. B. ſed qu.*] the ſeventh of this king, that a recovery operated as a revocation. I apprehend, this caſe comes within th words of the ſtatute, which ſays, "Unleſs altered by another wi "in writing:" And here is one in writing found. I am of opinion, there is ſufficient ground for me to determine it a revocation.

I am therefore of opinion that there ought to be judgment for th plaintiff.

Mr. Juſtice *Blackſtone*—In conſidering this ſpecial verdict, I wa at firſt inclined to think, it was either imperfect or repugnant, an therefore that there ſhould have been a *venire facias de novo*; o further conſideration, I think it is neither. Not imperfect, for the have found every thing they can, and it would be ſuperfluous t order a new jury; not repugnant, becauſe I can conceive a caſe i evidence, which would warrant ſuch a finding, as teſtator ſaying "He had made a new will; but no man ſhould know in what ti "after his death." But though the finding may be good, as t theſe particulars, yet the circumſtances may be ſo ſlender, as not t warrant our determination in overſetting a legal and apparent diſpoſition. They find, that the plaintiff was almoſt abſolutely diſinherited by the firſt will, which is now exiſting, and apparent legally before the court; they find a ſecond will, which appears not, nor i any where to be found.

I ſhall not enter into the crude and uncertain opinions of earl times; but ſhall enter into the caſe of Sir *H. Killigrew*'s will, ju previous to the ſtatute of frauds; which paſſed before almoſt all th courts of law and equity, and finally into the Houſe of Lords.

The caſe, I apprehend, was this: Sir *H. Killigrew*, in 164 made a will in favour of a Mrs. *Berkeley*, and a natural ſon; in 1645 he made a ſecond, which, like this, was never found.

Soon after the reſtoration, the court directed an iſſue to be tried
y a jury of the county of *Cornwall*, whether the will was revoked.
The jury find generally, that it was revoked. Serjeant *Maynard* re-
orts, 1 *Show*. that the old gentleman, meaning Lord *Hale*, won-
ered what the jury could mean. A ſecond iſſue was ordered in
erkſhire; the jury find ſpecially, that he made a ſecond will, "*aliud*
teſtamentum;" but do not find, that he deviſed any lands by the
econd will; a third trial was offered, but the parties declined it,
eſpairing, I preſume, of any more light upon the ſecond will. The
ourt was of opinion, therefore, on the finding upon the ſecond iſ-
ue, that it not being found whether there were any lands deviſed,
ſtood *indifferenter*: And accordingly they adjudged. 2 *Car*. 2.
ardr. 374. And on this ground the third trial was offered.

After this, it came before Lord *Nottingham*, in the court of Chan-
ery; and, to ſtop the merits, his Lordſhip granted a perpetual in-
nction: But, ſome time after, they ſucceeded better with the
aſter of the Rolls, and ſo got rid of the injunction.

This caſe is very well reported 3 *Mod*. 203, and 1 *Sh*. 146. It
alſo reported in *Cumberbach*, 90, but very ill. The argument be-
ng on the ſecond day from King *William*'s landing, no judgment
as given at that time; and all thoſe judges were removed at the
evolution. But in *Trinity* term, 5 *W*. judgment was given for the
laintiff, who made title under the firſt will: A writ of error was
rought into the Houſe of Lords, to reverſe the judgment, but it
as affirmed. And by *Salkeld*, 592, it appears, the court were of
pinion, that it might concern other lands, or no lands at all, or be
confirmation of the former.

It has been admitted, and received as law, before and ſince the
atute of frauds, for near an hundred years, that a ſecond will, no
here to be found, cannot operate as a revocation; and a will which
not neceſſarily inconſiſtent, ſhall not, where the contents appear,
perate as a revocation; and therefore in *Coward* and *Marſhall*, *Cro*.
. 721. *A*. deviſes lands to his youngeſt ſon, and his heirs; and
fterwards remarried, and, by another will, deviſed the land to his
me for life, paying annually a rent to the youngeſt ſon, and his
eirs. Whether this be a revocation, was the queſtion? and held,
ot; but both may ſtand, unleſs manifeſtly contrary. In the pre-
nt caſe, does it appear the ſecond will, muſt be inconſiſtent with
he firſt?

It is obſervable upon the caſe in *Hardr*. my Lord *Hale* agrees with
e reſt of the Barons, in thinking that the ſecond will not appear-
g, does not revoke the firſt; though he thought that a ſubſequent,

independent will, whether conſiſtent or not, even though of chat tels only, would operate as a revocation.

I rely on the caſe already cited, that, where the matter ſtands i *differenter*, it may concern other lands, or no lands at all, or ma agree with and confirm the former. There is no finding, but th this ſecond will is not an exact tranſcript of the former. The jur find a different diſpoſition; this might have been found without a ſpe cial jury. How does it differ? Was it of lands, or not? Was real, perſonal, or mixed? Did it enlarge or leſſen the deviſes of th former? How did it affect Mrs. *Harwood*'s claim? Did it take away entirely, or make a change in it, as to ſome particular limita tion, or leave it entirely untouched?

It is impoſſible to find an anſwer on the verdict to any of the queſtions; and yet, without one, without our ſeeing more fully tha at preſent the purport of the ſecond will, how are we to determin that Mrs. *Harwood*'s apparent claim is defeated by it? A mournin ring, or a hatband, would ſatiſfy the finding.

So ſtrictly was revocation interpreted, to avoid prejudice to an eſ tabliſhed will, even before the ſtatute, *Cro. Car.* 51. Teſtato deviſes certain legacies to his brothers, and other perſons; afterwards in the ſpace of ſome years, falling ſick, he was aſked queſtions, con cerning whom he would have executor, and of his funeral, *&c.* and farther, was deſired to give legacies to his father, brothers, and othe relations: Said he would not give or leave them any thing. All this wa ſet down in a codicil, and proved. Whether this was a revocation o the legacies to the two brothers, plaintiffs? And determined not, on th caſe made; and ſo decreed by the Lord Keeper, aſſiſted by the Maſ ter of the Rolls, and the three judges, *Doddridge*, *Jones*, and *Croke* For, *non conſtat*, what the teſtator meant by thoſe words, and upo ſuch doubtful ſpeeches, to nullify a will adviſedly made, withou clear and perſpicuous revocation, ſhall not be admitted. So here, *no* *conſtat*, what is meant by this different diſpoſition, or to what it ex tends: And we cannot, to help the difficulty, go out of the verdict for I take it to be a ſettled rule, that nothing ſhall be preſumed on ſpecial verdict, except by neceſſary implication; except in the caſe o ſpoliation, where every thing ſhall be preſumed againſt the ſpoiler But here, the jury find a ſtrong negative; for "they do not fin " that teſtator cancelled, or defendant deſtroyed it." And if an preſumption could be admitted on *any* verdict, the law will certainl never preſume a crime, in any inſtance. However, it is ſaid, ſome thing muſt be preſumed on both ſides; and if that be ſo, the ſcale ſhall preponderate in favour of the heir. But a negative is no pre ſumption, that lands are not gavelkind; that a will is not revoked and the like: This is not preſuming; it is a queſtion on matter o fac fact, and the proof lies to be made on the other ſide, *non neganti ſed affirmanti incumbit probatio.* And in this caſe, preſumptions are neceſſary for the heir, but not for the deviſee; who ſhews a plain title, and puts the oppoſite party to the poſitive proof of it's being defeated. Maxim.

And here too, the cuſtody of the ſecond will is never ſurely to be preſumed in the deviſee of the firſt. For if it was againſt her, it would have been entruſted to any body's hands but her's; if for her, it matters not who was entruſted with it.

Revocations of deviſes (and the ſame may be ſaid of uſes) are either immediate and direct, or conſtructive.

The former ſpecies of revocations might be introduced by parol, before the ſtatute, in the moſt improper manner; and theſe the ſtatute provides againſt. With reſpect to the other ſort, 1 *Vezey*, 292, it is reported Lord *Hardwicke* ſaid, "Theſe words of the ſtatute "(referring to the 6 *ſ.*) are an expreſs excluſion of any other means: "For the words againſt the clauſe are both negative and affirmative." And in *Atkins*, it muſt purſue *ſ.* 6. which ſection is, "No deviſe in "writing, of lands, tenements, or hereditaments, or any clauſe there"of, ſhall be revocable, otherwiſe than by ſome other will, or co"dicil, in writing, or other writing declaring the ſame, or by burn"ing, cancelling, tearing, or obliterating the ſame, by the teſtator "himſelf, or in his preſence, and by his directions and conſent. "But all deviſes and bequeſts of lands and tenements ſhall continue "in force until the ſame be burned, cancelled, torn, or obliterated, "by the teſtator, or his directions, in manner aforeſaid, or unleſs "the ſame be altered by ſome other will or codicil, in writing, or "other writing of the deviſor, ſigned in the preſence of three or more "witneſſes, declaring the ſame." Whatever, then, Lord *Hale*'s opinion of a will of chattels revoking lands might be, before the ſtatute, it cannot now be law; all preſumptive revocations are at an end. And very probably, if the time is conſidered, Lord *Hale*'s opinion in that caſe gave riſe to that part of the ſtatute.

The attempt is hitherto unprecedented, of deſtroying one valid will by another hitherto unknown: And, whatever favour the heir may merit in the eye of law, I will venture to aſſert, his claim is not more ſacred, in a free, commercial country, than a valid and apparent teſtamentary diſpoſition.

If there be any queſtion, it ſhall be between the deviſees of the firſt and ſecond will; but never to let in the heir. And 3 *Mod.* 258, goes ſtill farther: For the plaintiff in ejectment made title as heir at law; the defendant under a will. The plaintiff produced a ſubſequent will, atteſted by three witneſſes, but not in preſence of teſt trix; which, though not good as a will, they contended, might good as a revocation; for that it was a writing ſufficient under th ſtatute of frauds: And, upon the firſt argument, it was adjudged f the defendant, "that a ſecond will muſt be a good will, in all i "circumſtances, to revoke a former will." It is reported al 1 *Show.* 159, and the court, in *Carthew*, 80, that the ſecond w cannot be good, as a deviſe of lands; and yet, that it cannot opera as a revocation, contrary to the intent of teſtatrix. And in the c 1 *W.* 343, Lord *Cowper* recognized the caſe of *Eccleſton* and *Spe* becauſe the deviſe of the ſame lands to the ſame perſon. And, f ought appears in the caſe before us, this may be even a legal devi of the ſame lands to the ſame perſon. And, if the ſecond will co tained a different diſpoſition to a third perſon, and the firſt will w deſtroyed, on a ſuppoſition that the ſecond was good, this, he ſai ſhould never let in the heir, though the ſecond turned out to be voi any more than a cancelling by miſtake, where a teſtator, ſick bed, and with two wills under his pillow, ſhould order his frie to cancel the laſt, who, inſtead thereof, cancels the firſt.

A ſecond deviſee might avail himſelf of a different diſpoſition, maintain an ejectment; but the heir muſt prove a revocation, a not a different diſpoſition: For, as Lord *Cowper* ſays above, "th "meaning of the ſecond will was to give to the ſecond deviſee wh "it took from the firſt; and if the ſecond could take nothing, th "firſt could loſe nothing."

I fear I have been too long; but the novelty of the caſe, and th greatneſs of the opinions againſt me, extorted it from me. I appre hend, that it would be of very dangerous conſequence; it would l in perjuries innumerable, and ſet aſide the ſtatute of frauds entirel Either an expreſs revocation ſhould be found, or ſuch contents of will as the court may clearly ſee.

Leaſt of all ſhould it be in the caſe of an heir at law; who mig keep a ſecond will private, and yet avail himſelf of it, as a revoc tion, by raiſing conjectures, which common ſenſe will preſum that the ſecond will was not a mere copy or tranſcript of the fir And therefore, I think, judgment for the defendant.

Mr. Juſtice *Gould*.—I diſagree with the opinion of my laſt learn brother; but entirely concur with that of my brother *Nares*.

I take the caſe to be entirely novel, and nothing ſimilar to it b the caſe alluded to of *Baſſet*: For there the jury did not find any lan deviſed by the ſecond will; the court held it immaterial.

Th

The court of King's Bench, at ſome diſtance of years, had in
fect the ſame caſe before them. It may be ſufficient to ſay, that
appeared to be the ſenſe of the bar, and of both courts, that a
cond, if not conſiſtent with the former, would amount to a revo-
tion. Indeed, though by the words of the ſtatute of frauds, an
preſs deviſe of lands is made neceſſary, or an expreſs revocation,
writing, yet Lord *Cowper* held, in the caſe before cited, that where
ere was a deviſe of chattels, with expreſs words of revocation, it
ould revoke lands.

I take it, from the extraordinary application and learning of thoſe
ho diſcuſſed Sir *H. Killigrew*'s will, that a ſecond will, not conſiſ-
nt with the former, is a revocation; for, *voluntas teſtatoris eſt am-* **Maxim.**
ulatoria uſque ad mortem: And revocations, by operation of law,
e not excluded by the ſtrong words of the ſtatute. And the in-
ntion of the teſtator is not neceſſary; for even againſt it the opera-
on of law ſhall revoke a will. And I think it never has been
oubted, that diſpoſitions of truſts, which are expreſsly mentioned
the eighth ſection, are not more revocable by operation of law
han a will. Even marriage, and birth of a child, has been held by
hree learned judges, a revocation.

There are three points to be conſidered:

1ſt, Of the exiſtence of the ſecond will.

2dly, The effect of it's non-production.

3dly, It's conſiſtence or inconſiſtence with the former.

As to the firſt, the exiſtence of the ſecond will, they do not find
he teſtator cancelled, or defendant deſtroyed it. This is ſimilar to
he caſe in *Hardreſs*, which *Finch*, the ſolicitor-general, contends
ith the court, that the finding of the jury was good there, which
as, that they did not find any lands deviſed; for that this, being
atter of fact, ſhall not be preſumed by the court: And very pro-
erly compares it to the caſe of fines without proclamations, *Hob.*
62. If a fine be found, but no finding of proclamations, the court
hall not preſume any: And in that caſe, if the jury had found that
hey did not find there were any proclamations, this would have
ade the verdict never a whit the worſe; for it would have been
nly a fuller explanation of their mind. Thus I take it here; when
will is found, the preſumption is, that it exiſts, till it be proved to
he contrary: And the finding of the jury leaves that at leaſt un-
ouched, and in it's full vigour.

As to the ſecond queſtion, of the effects of it's non-production whoever has the poſſeſſion of one teſtamentary diſpoſition may be presumed to have the poſſeſſion of all, and can come at them. It i againſt reaſon to ſuppoſe the heir deſtroyed it, who is almoſt totall diſinherited by the firſt. Next, the finding does not take away th preſumption of deviſee having the will in her poſſeſſion, if it doe not even ſtrengthen it.

We muſt at leaſt ſuppoſe, if that ground is not tenable, that th will is miſlaid or loſt: And then the finding is good, and the evidence properly admiſſible, at common law. The jury find, tha what is become of it they know not. The jury in *Hitchin* and *Baſſet* find, *aliud teſtamentum*, in writing, which, by the law of evidence, ſpeaks as well after the ſtatute of frauds as before.

It is true, the ſtatute of frauds requires a will in writing; but i the will exiſts, the defendant is preſumed to have it; if loſt, it mu be proved as it can.

Maxim. 3dly, I think we muſt take it, that the jury find abſolutely a different will: *Qui dicit generaliter nihil excludit.* If they had though the diſpoſition differed partially, they would have ſaid ſo. I can' help taking them to underſtand, that the general diſpoſition was different, though in ſome particulars it may agree: And this is certainl a revocation.

But ſuppoſe them not to be taken ſo generally; and that it b uncertain whether a general or a partial difference, yet it puts th deviſee to her title.

The title of all fees is, *prima facie*, in the heir; it muſt be take from him by clear and unexceptionable title, and the deviſee is a abatrix, unleſs ſhe ſhews a written title againſt him. The heir i ſaid to be the favourite of the law, but this is not ſtrictly true; fo in the ſcale of equal juſtice, there is no favourite; but the law fee a clear title in the heir, and therefore will expect certainty to overſet it.

I can't ſubſcribe to the *obiter dictum* of my Lord *Cowper*, in th caſe alluded to from *Peere Williams*, who ſays, if the deviſee wa different under the ſecond will, and the firſt was deſtroyed, on ſuppoſition that the ſecond would be good; if afterwards the ſecon turns out void, this ſhall not let in the heir; nor take from the former deviſee, to veſt in him. This would be finally to veſt in a perſon in whom finally the teſtator did not mean it ſhould veſt, in prejudice to the heir, who, *prima facie*, has the title.

Bu

But are we clear that the heir had not at laſt the favour of the ſtator, and that a perſon entirely a ſtranger to his blood ſhould eep all. The preſumption you may ſee in *Swinburne* 160, by ry ſtrong caſes carries an almoſt irreſiſtible bias in favour of the ir. And the teſtator in his ſecond will might, if I may ſay ſo, be a more perfect ſtate of ſanity, and the natural regard to the heir ve its effect.

I will cite, as to the heir's being a favourite, what Lord *Hardicke* ſaid in a caſe before him, which was taken by the afterwards ord Chief Juſtice *Wilmot*, who was even then eſteemed remarkly accurate in his notes.

“ There are a great variety of caſes artificially diſtinguiſhed, concerning the favour always ſhewn to an heir at law. [As where preſumptions are taken from change of circumſtances, or from ſome act or ſaying of the teſtator, whence it is concluded it might be, that the teſtator meant to make an alteration in his will.] This reaſoning is ſometimes rather forced, and perhaps not a little too refined; but where there is a ſecond will there is no ſuch difficulty; and we may do an injuſtice if we diſinherit the heir; but the claim of the deviſee being vitiated by uncertainty, there is no ſuch danger.” I am therefore of opinion, that judgment ould be for the plaintiff.

Lord Chief Juſtice *De Grey*—There can be no occaſion, after ſo rned and accurate a diſcuſſion, to enter into an argument. I will te my opinion on detached grounds.—It appears clearly to every e who conſiders the ſubject, that the heir has an original and ſubntive, the deviſee a dependant and derivative title, ſuppoſing the me diſpoſition continue to the death of teſtator.

The teſtator is preſumed to have continued in his intention, till is proved he has done the contrary; ſo where a change of intenon appears the ſame conſtancy is preſumed, till farther alteration apparent. It appears too, that a perſon may make an alteration adually by different diſpoſitions, in different inſtruments. We ay ſee the difficulty in the caſe *Cro. E. Coward* and *Marſhall*, a dicil is an inſtrument to vary; a will, in its *primâ facie* import, all be intended a full declaration what ſhall be done after the teſtars death; and therefore a ſecond, revocation of the former. The urt with great caution and prudence ſaid there, it ſhall be only a vocation *pro tanto*. I take it to be right what my brother *Blackne* ſaid, that it was the final opinion, that a will ſhall not be premed *ipſo facto* a revocation of the former; but the court ſhall ſee e contents. But the variety of trials ſhewed great heſitation; and ough it ſtands finally, and ſo I am willing to take it, that a ſecond will, without looking into the contents, ſhall not revoke the former; yet, if you can look ſo far, as to find that there was a different will, then the firſt will, if I may uſe the expreſſion, is not the laſt.

But let us ſuppoſe the caſe in *Hitchin* and *Baſſet* to have been, not that the will could abſolutely not be found, but that the reſt being deſtroyed by fire or vermin, there remained only the ſignature of teſtator with the date, and atteſtations of the three ſubſcribing witneſſes; and theſe words in the beginning "I hereby revoke all former wills," this is not merely a revoking but a diſpoſing will; for throwing the other into the fire would have anſwered the purpoſe of revocation. I conceive Lord *Cowper* may be underſtood of a conditional revocation; as if it were—"if ſuch a deviſee can "take, that then the former will be revoked; there if the ſecond "deviſee by event cannot take the former will ſhall ſtand." If a man had deviſed, "I hereby diſpoſe of all my worldly eſtate as fol"lows:" I apprehend no man could claim under the former will. If in this caſe, it had been, "whereas I have diſpoſed of the grea"ter part of my eſtate to Mrs. *Harwood*, I hereby make a different "diſpoſition;" this, I conceive, would have prevented her entitling herſelf under the former will.

In the caſe of *Kitchen* and *Baſſet*, it appears, "that the making "a new inſtrument preſumes ſome change, but may not be of itſelf "ſufficient to revoke." But it will, if there be other circumſtances, as if the ſituation of his family was in general at leaſt the ſame as before, his eſtates the ſame; he makes a will with three atteſting witneſſes, (which was not neceſſary as to perſonalty but to real only, and Mr. *Lacy*, was a perſon very converſant in courts of law, and a very able lawyer.) Circumſtances being ſuch, claiming under a derivative title you muſt ſhew me, (and there I ground my judgment, in which I am ſorry to differ from my very learned brother *Blackſtone*;) nothing has been done by the ſecond will, to affect your claim, ſhew me that the diſpoſition of the ſecond varies not as to you; and we are ſatisfied. Can Mrs. *Harwood* maintain her title without preſuming? It muſt be preſumed the ſecond will does not concern lands, or only partially, or only in an eſtate for life.

If it may be otherwiſe, I apprehend that a will may be evidence of different contents, yet if we can't produce the inſtrument there will be no effect: And yet no man ſhall ſuffer for loſs of evidence in writing, by fire or other misfortune; and even records ſhall be proved as they can.

What is the caſe of two wills without dates? *A.* takes by one will, *B.* by another; both come in excluſion of the heir: And yet as neither can prove as againſt the other, the title, the court will not arbitrate between the parties, will not permit them (as might ppear on the principles of natural juſtice) to divide, but the heir t law ſtands aloof againſt all the world, and ſays till ſome of you an prove an expreſs title againſt me, my original right ſhall ſtand.

In the caſe of ſpoliation it is preſumed, the ſpoliation was made y the deviſee; becauſe the inſtrument deſtroyed was againſt the deviſee.

I can ſee no ground, that the diſappointment of the intention of he ſecond will ſhould ſet up the former.

The jury do not find that he did cancel it, I might almoſt ſay they find he did not; but law will preſume it not cancelled till proof. And I have ſaid already the effect may operate as a revocation, and yet the purpoſe never anſwered.

In the caſe of Lord *Lincoln*, who in compliment to a lady he intended to marry raiſed uſes, and yet never married, none of theſe uſes took effect; yet they operated to defeat his will: And ſo it would have been had he actually married, and all the uſes had been ſpent. A woman makes a will when ſole, and after marries; and by operation of law, though her huſband dies before her, yet the act of marriage was a revocation; and, as every will implies revocability, that power being taken away, the will no longer ſubſiſts: So where a man marries and has children; (by a late determination) and yet, here are no words of revocation. I am therefore of opinion, that judgment ought to be for the plaintiff before the deciſion.

'Tis obſervable, that on the conference upon the bench it was remarked, that Mr. *Lacy* might be in doubt, for it was at leaſt a queſtion at the time of his making the will, whether a reverſionary intereſt which he had, would paſs by the words real and perſonal eſtate; and if they comprehend what was not a legal eſtate, but a bare equitable intereſt.

Serjeant *Burland* obſerved, the caſe of *Glazier* in the *K. B.* had been determined in the Eccleſiaſtical Court, before Sir *George Lee*, *Vide Hilliers* caſe, 3 *Atkins* 798. the contrary way; and that from the eccleſiaſtical law we borrow all our ideas of wills. That if we were to conjecture, the intent might rather be to give her money inſtead of chambers, which he ſuppoſed, on account of her ſex, by the laws of the ſociety ſhe could not inhabit. Serjeant *Davy* ſaid, he had forborne to ſay any thing before about the eccleſiaſtical courts on purpoſe, but if that was to the point, he had the ſtrongeſt caſe in the world, for they had determined for him. The court declined giving judgment on the inſtant, which Serjeant *Davy* urged, as he ſaid, he had no doubt a judgment in their favour would releaſe 10,000*l.* out of Chancery.

Lord Chief Juſtice—If the court ſhould ſee cauſe to determine in your favour, there would yet be certainly a writ of error.

N. B. I learn by a friend, that teſtator was tenant in tail of the lands, under his father's ſettlement, with a reverſion to the right heirs in tail, whoſe heir teſtator was; and the lands having been ſold, was directed by ſtatute 8th of Queen *Ann*, in ſome degree confirming, in others altering, the ſettlement to reveſt part of the money ariſen from the ſale, in other lands to uſes of that ſettlement. Teſtator died without iſſue, and without reveſting, and his heir at law claims as by the reverſion; and alſo that *Mr. Juſtice Nares*, in ſaying that the lands might deſcend to the heir, till diſcovery *obſerved on the authority laid down by Lord Coke*, *Co. Litt.* 111. that where deviſor ſeized in fee deviſes lands by will, the freehold or intereſt in law is in deviſee before entry; and in that caſe nothing deſcends to the heir. This however he ſeemed to hold as an obiter *dictum*, and to deny the law as there held; and therefore that notwithſtanding, in the caſe before the court the lands might deſcend conditionally, though the deviſor here, by failure of iſſue at his deceaſe, had the reverſion in him at the time of his death, as tenant in fee.

Interrogatories.

KEEPER of *Maidſtone* Gail ſworn to anſwer interrogatories, touching a CONTEMPT, ſuppoſed to have been committed by him againſt this COURT. For default of bail he was COMMITTED.

I am reminded by a worthy friend of the following caſe; ex parte Hellier Apr. 30th, 1754, 3 Atk. 798.

A queſtion in a cauſe before Sir George Lee as Judge of the Prerogative Court, whether the execution of a *ſecond* will is a *revocation* of the *firſt*, though the ſecond was afterwards cancelled; and whether ſuch *cancelling ſet up* the firſt will *again*.

Sir George Lee gave ſentence that it was a revocation; and that the cancelling the ſecond did not ſet up the firſt.

A petition was prepared to the Lord Chancellor on the part of the principal deviſees, for a full commiſſion of delegates; and alſo a croſs petition praying that the commiſſion may iſſue to judges of the common law and civilians *only*.

Lord Hardwicke directed a commiſſion of delegates to judges and civilians only.

Et ut audivi this caſe afterwards came before the delegates, and the majority confirmed Sir George Lee's ſentence ex relatione Rowlandi Aynſworth Armig. J. C. Vide infra the caſe of Berkenſhaw and Gilbert.

Notice in Ejectment.

DECLARATION delivered at a houſe of ——— in *Buckinghamſhire*, which borders on lands in *Oxfordſhire*, for which ands the ejectment was brought.

Mr. *Cowper* obſerved, that declaration in ejectment was in the ature of an original writ, as proceedings commence by it. And hat the Common Pleas carried it ſo far, that they expected it to be erved on the premiſſes demanded in ejectment; and would not take ervice on the wife, to be ſervice on the huſband.

Court were agreed ſervice upon the *party* at his houſe was *good*, hough the premiſſes were in another county.

And Mr. Juſtice *Aſton* ſaid it differed from an original writ, becauſe the *ſheriff* had not a juriſdiction out of his county.

Information.

ON a motion for an information, the *original* papers ſhould *not* be annexed to the affidavit, as it produces a difficulty and rouble on a trial.

Ejectment.

MOTION for judgment againſt the *caſual* ejector.

There were *joint partners* in the buſineſs of brewers, and the declaration was ſerved on *one*.

Per curiam, that it would *not do* as they had *not* ſerved it upon *both*; it *not* appearing that they lived both in the ſame houſe.

Attachment.

MOTION for an ATTACHMENT againſt the SHERIFF for *not returning the* WRIT.

The court at firſt doubted, whether the motion was righr the *laſt* day of term.

Mr. *Buller* ſaid, whenever the attachment was *abſolute* in the *firſt* inſtance, he underſtood it to be the rule, that it might be moved the *laſt* day of term.

Court—You muſt ſerve *perſonally*, to make it *abſolute*. The *under ſheriff* has a *public office*, and it ſhould have been ſerved there. Inſtead of this, it was ſerved upon a maid ſervant.

Oyer of Copy.

Of Letters of Adminiſtration.

MOTION, that oyer of a copy out of the conſiſtory court, may be ſufficient oyer.

Objection, that letters of adminiſtration are not like a deed.

And that it being ſtated, the letters of adminiſtration were taken out of his pocket, the party was *not* entitled, as he gave *no account* of them, nor did it *appear* they were *loſt*; and unleſs this *di* appear, he ſhould not have recourſe to a *copy*, even in the caſe of *deed*.

Rule absolute, that oyer of a copy from the conſiſtory cour be *ſufficient oyer*.

Declaration in Ejectment.

SERVICE of declaration in ejectment on the niece, in the *abſence* of the tenant in poſſeſſion.

It was ſaid, though this ſervice had been admitted to be *goo* where the tenant in poſſeſſion *abſconded*, to keep out of the way o the notice; yet here the aunt had in fact not abſconded, nor was ou of the way, with an intent to *avoid* the notice: But that ſhe kep a boarding-ſchool, and it was her cuſtom to be abſent at *Whitſunti* and *Chriſtmaſs*. That the niece received the notice, ſhe, the aunt being abſent, according to her cuſtom. But that the niece did no tell her of it, as ſhe did not know when ſhe would come home.

But it not being denied in the affidavit, that the niece did *give* th notice, nor denied that the aunt *received* it, upon theſe grounds Rule absolute.

Conſtable'

Conſtable's Return.

COMPLAINT againſt the conſtable by the grand jury, for refuſing to amend his return; he returned *generally* that *all* was *right* in the pariſh.

There happened to be a very *bad* road in it which the conſtable had *not* preſented: And the grand jury therefore directed him to *amend* his *return*, which he *refuſed* to do.

He ſaid in his excuſe that it was *true* the road was *very bad*, but the man had *promiſed* to *mend*.

Lord *Mansfield*—You ſhould have remembered you were on your *oath*, and to find according to *truth* and *fact*. The JURY have done *right*. It is *extremely* blameable in a conſtable to find upon *favour* and *affection*.

The JURY would do *well* to conſider whether they might not do *very right* to find a BILL of INDICTMENT againſt him which as JUSTICES of PEACE, ſo is the GRAND JURY impowered at COMMON LAW to do on their *own knowledge*, as well as upon the *information* of *others*.

The evil has diffuſed itſelf in a *ſcandalous* manner over the *kingdom*.

Evidence.

OBJECTION to a receipt for damages taken by the plaintiff's attorney, ſpecifying the verdict, that this was *not evidence* of the judgment, for that *nothing* leſs than a copy of the judgment, duly *authenticated*, could be evidence of the judgment.

Lord *Mansfield diſallowed* the objection, declaring it was *captious*, that there was *no diſpute* between the parties as to the *reality* of the judgment; and that *all* the queſtion between them was matter of *form*, and even *that might* have been *cured*, if the *jury* would have *waited* a couple of hours. That on a ſimiliar objection at *Guildhall*, he made the jury *ſtay* for a *copy* of the judgment.

Attachment.

ON a rule to ſhew cauſe why an *attachment* ſhould not be ſe aſide for *irregularity*. The irregularity complained of was that the attachment was *abſolute* in the firſt inſtance.

The maſter ſaid it was *diſcretionary* in the court, whether it ſhould be abſolute in the *firſt* inſtance or *not*.

That the ſheriff, for not *returning* the *writ*, parties, for non-payment of *coſts*, purſuant to a rule of court, have the rule ABSOLUTE againſt them in the *firſt* inſtance: And that he apprehended that the *general* rule was, that wherever a party was guilty of a *contempt*, he ſhall *anſwer* in *cuſtody*.

King and *Jones*, in *Strange*.

That *Salkeld*, 84, it was ſaid, it was not *uſual* to give a *ſecon* rule to a party who had *ſlighted* the *firſt*; that he ſhould anſwer i *cuſtody*; that to do otherwiſe would be to expoſe the court to further contempt.

Mr. *Dunning*—That unleſs the *juſtice* of a court is *obſtructed*, a *attachment* will *never be granted* in the *firſt inſtance*.

That where there is an application againſt parties, for diſobeying a rule of any nature leſs high than that of the *immediate* and *neceſſary* juſtice of the court, the court will *always* give them an opportunity of *juſtifying* themſelves.

That this was entirely different to the caſe of a refuſal to pa money under an order of court, or of *inſulting* an officer of th court.

That *one* of the parties was an *infant*, and that the court would certainly not *attach* him, for doing what by law he could not *do* being guilty of a *contempt*, an offence which he was not of *age* or *diſcretion* to incur.

Lord *Mansfield* deſired to ſee the rule, and the affidavit upon which it iſſued, and the affidavit of diſobedience.

With regard to the general practice, Lord *Mansfield* enquired; and there was, he ſaid, a little difference of opinion, as to the general rule.

Bu

But in the preſent caſe (his Lordſhip added) it is as *clear* as the un, the rule ſhould *not* go *abſolute:* For, as to *many*, it was *not de-* *vered perſonally*; and, as to undertaking to deliver up poſſeſſion, hey *can* anſwer no farther than to what was in their *own* power, nd not *jointly* and *ſeverally*.

In caſe of non-payment of coſts, the attachment is in the nature f an execution; but here, the defendant was apparently in the ſitu- tion of not being *able* to make title. And the parties *knew it:* For *bailed* him at *Guildhall*, and would not *ſuffer* a *large* ſum to be re- uired, though I could not diſmiſs *without* bail.

Mr. Juſtice *Aſton*—I wonder very much at the doubt.

As to non-payment, it is in the nature of an execution upon a ci- il ſuit; as to the diſobedience of the *ſheriff*, he is an *officer* of the ourt; as to *contemptuous* words againſt the *proceſs*, or *inſult*, by words r actions, when this is repreſented by the officer to them, the court ill pay a particular attention in favour of the proceſs; and in *theſe* nſtances the rule is *abſolute at firſt*. But, where a *reaſon* may be *ſſigned* for *non-performance* of the rule, as on not obeying an award, r the like, the court will *always* grant a rule *to ſhew cauſe at firſt:* nd I wonder the *officers* of the court ſhould have *any doubt* about .

Q. N. Nam videtur valde bone diverſitie.

Lord *Mansfield* obſerved, that an attachment for non-payment of oſts, was ſo much in the nature of an execution, that the parties ere not bailable.

Lord Mexborough *againſt* Sir John Delaval.

ON a rule to ſhew cauſe why, on payment of coſts, judgment ſhould not be ſet aſide againſt defendant, upon two *nihils* re- urned on two writs of *ſcire facias*. And why the defendant ſhould ot be permitted to come in as executor, and plead *nil debet*.

The caſe appears to have been, that Sir *Francis Delaval* being ndebted 10,000*l.* to Lord *Mexborough*, his brother, Sir *Thomas*, oined with him as ſecurity; that afterwards Sir *Francis* applied for 000*l.* to pay off annuities, which his brother, Sir *John*, lent him; he ſurplus, if any, to be applied to the payment of Lord *Mexbo- ough*'s judgment debt. That afterwards a propoſal was made, to hange Sir *Thomas*'s ſecurity for that of Sir *John*'s, on condition hat Sir *Francis* ſhould make an eſtate tail to the ſon of Sir *John*;

which condition was *never* performed, and Sir *Francis* died about quarter of a year afterwards, and the eſtate *deſcended* to Sir *Joh* Lord *Mexborough*, on a *falſe return* of two *nihils*, procures judgmen on the 10,000*l.* debt againſt Sir *John*, who was executor.

Counſel againſt the rule—Whenever the court ſets aſide a judg ment *regularly* obtained, it is always to let in the *merits* and juſtic of the caſe: And if theſe be not here with the defendant, your Lord ſhip will not grant him the indulgence of this ſummary proceeding

Sir *Francis Blake Delaval* was tenant for life of a very large eſtat yet, wanting money, he borrowed 10,000*l.* Sir *Francis Delaval* brother had the eſtate made over by an aſſignment in truſt, to pa an annuity to Sir *Francis Delaval.*

It was thought proper the brother, Mr. *Thomas Delaval*, ſhoul make a ſecurity, with his brother, to Lord *Mexborough*, for 10,000 It was thought, between the family, that it would be better to l in Sir *Francis*'s other brother, inſtead of *Thomas*; and Sir *John* w to pay 4000*l. per annum*, on condition that Sir *Francis* ſhould joi to cut off the intail when his ſon came at age, and that the deb ſhould be paid off. Lord *Mexborough* was adviſed to give up h former ſecurity, which he did, and ſet up the covenant only, a the firſt judgment obtained againſt Sir *Francis* ſolely. Sir *John* w to pay only 2500*l.*

Sir *John* contended, that he was not bound to pay the debt o the eſtate, as Sir *Francis* died in a quarter of a year, without havi performed the condition of making an eſtate tail; and that he w executor to the covenantor, and could not be ſued upon the death o the teſtator, who was covenantee. That Lord *Mexborough* havi been prevailed on to give up his former ſecurity, and having *no r* medy, but upon the executor of the teſtator, the court would n ſuffer the judgment to be ſet aſide, in *prejudice* to the juſtice of th caſe.

Judgment by default was ſigned on the ſecond *ſcire facias.*

A *fieri facias* was then ſued out, and the ſheriff returned *nu* *bona.*

A *devaſtavit* had been ſued out, upon which the defendant plead the general iſſue, *nil debet*;—that the defendant was informed of the proceedings againſt him.

Mr. *Wallace*—If Sir *Francis Delaval* has any remedy to which is entitled, he will have it in another manner.

T

The ground of the application is, that Sir *John Delaval* has no ore aſſets than 1600*l.* to ſatisfy the 10,000*l.* and therefore applies the court, that he may not be liable to pay any more. It is not nied, that Lord *Mexborough* had lent the ſum; but he entered in- an agreement with Sir *Francis*, who became bound with his bro- er.

Sir *John* comes in after, only in a more beneficial manner, as a covery is to be ſuffered as ſoon as his ſon ſhall come of age, that en a term ſhall be created to raiſe the ſum of 25,000*l.* for pay- ent of the debts, among which Lord *Mexborough*'s is one. An nuity is provided for Sir *Francis*, to ceaſe when Sir *Francis* ſhall ink fit to advance himſelf in marriage. Lord *Mexborough* was plied to, that Sir *Francis* and *Thomas* had ceaſed to act; that Sir *hn* had taken the management; that an abſolute ſecurity ſhould made, as before, to his Lordſhip: He was aſſured of this by Sir *rancis*, in the preſence of Sir *John*'s attorney.

That afterwards Sir *John*, upon the death of Sir *Francis*, ſet up e non-performance of the conſideration, of making the eſtate tail. hat in the caſe in *Strange*——*Wharton*, the court would not ad- it the executrix to plead, that ſhe was ready to ſatisfy the creditor ith all aſſets in her hands, merely on account of delay.

Mr. *Cowper* ſaid, that Lord *Mexborough*, having an equitable claim d leaſe, and a legal right, and having proceeded regularly, ſhall erefore be entitled to his legal remedy, and the defendant not ad- iſſible to a ſummary relief.

Mr. *Buller*—That, on principles of law and equity, the plaintiff as entitled, and the defendant barred: That the debt was juſt, and e proceedings in it regular. That as to equity, the defendant ould *bring equity* with him, when he *demands* it; that he ſhould y *equitable* aſſets.

Mr. *Dunning*, on the other ſide—This caſe ſtands upon a *pecu- ar* footing. I underſtand, that the learned Serjeant, who ſpoke be- re, profeſſed that the rule muſt ſtand, unleſs there could be *new* atter, on which he could ſhew the court otherwiſe.

That as to the coſts, if the gentlemen dropped their action in the ommon Pleas, then the coſts would be paid; if it were continued, ey would await the event. That as to the intent of *not* paying e 10,000*l.* it was at leaſt *doubtful* whether ſuch was the meaning f the application. That as to *delay*, the circumſtances were dif- rent from what had been ſtated. That Sir *John* was not *apprehen-*

ſive of the effects of the proceedings againſt him, and therefore *di* *not* proceed with the utmoſt expedition.

That as to the 5000*l.* if they were *legally* entitled to it, they would recover it the only way by which a legal debt is to be reco-vered, that is, *legally*. That the caſe in *Strange* differed extremely because there the matter had been *decided*, as to *liability*, two year before: And whether a delay *after* that, upon an application, as o courſe, was like a delay of one term only, the matter not being de-cided, he ſubmitted to the court. That caſe, indeed, was cited only for what the court had ſaid, and which they alſo had ſaid in the ſe-cond caſe, then referred to, with reſpect to not driving the party t an *auditâ querelon*, a method in a great meaſure obſolete, the ſam thing being done on motion. That theſe returns are in fact matte of courſe, and it was not deſired of them to do their *duty* by *ſerv-ing* the two writs, but that they ſhould return the two *nihils*, inſtea of ſerving them, this is contended. This is the *equity* for whic they contend.

They ſay before the court, in ſubſtance, if you don't give us th 5000*l.* give us a *legal* right to 5000*l.* Why this pains? If the have a legal right, they will litigate it with us; if not, why do the claim? As to this 5000*l.* it was lent by Sir *John Delaval* to hi brother, for paying off annuities; and becauſe Sir *Francis* had no agreed with his annuitants. And for the payment of other deb are words added, with reſpect to the application of the *ſurplus.* I it to be conceived that Sir *John Delaval*, who *lent* a ſum to hi brother, to be repaid, *ex vi termini*, for *paying* off *preſſing incum-brances*, ſhould now be obliged to give 5000*l.* for the benefit o his brother-in-law, Lord *Mexborough?*

As to the deed, if Lord *Mexborough* was in contemplation, he i in the number of thoſe who are entitled to the 2500*l.* Shall a co venant be enforced when the condition has *totally* failed? It is *tru* Sir *John* has *now* the eſtate; but that was not the benefit in con-templation; the benefit in contemplation was to move from Si *Francis:* In conſequence of which, and in the *conſideration* whereo Sir *John* was to pay the 2500*l.* The poſſeſſion of this eſtate is in-dependent on the deed, advantageous as it has happened, but *foreig* entirely to the deed.

That an *equitable* title has ariſen has been next ſtated, from con-verſation between Sir *Francis* and Lord and Lady *Mexborough*, i the preſence of Mr. *Farral*. It may be ſufficient to ſay, Sir *Joh* was not preſent, and that Mr. *Farral* had never been employed b Sir *Francis*. It permitting his brother to employ his *own* attorney in a deed for his brother's benefit, was making that attorney his *ow*

attorney

ttorney, I do not know: There is nothing elſe that can in this nſtance.

The buſineſs of Sir *Francis* with Lord *Mexborough* and his Lady as *nothing* to Sir *John*. If Sir *Francis did* ſay that ſecurity was *bſolute* upon this deed, he *miſrepreſented* the matter; but neither s *this* any thing to Sir *John*.

If it be ſaid that as an executor he has taken benefit, and is lia- le; if it be a benefit, it is one he entered into *reluctantly*, only king the office as heir of the family, to bind himſelf as to what he hought aſſets.

Serjeant *Davy*—It has been the practice *long* before I knew *Weſt- inſter Hall*, that where there have been *two nihils* returned, and he defendant had been informed he could have made his diſcharge, he court will not put him to the trouble of an *audita querela*. I on't remember *one* ſince I have known *Weſtminſter Hall*; the court as always *relieved* upon motion.

A practice there has been for the ſheriff to return *nihil*, that is, othing within his bailiwick by which he can ſummon the party; his is done by the deſire of the proſecutor. A ſecond writ iſſues, nd then the principle laid down, is, that on *two nihils* returned it hall be the ſame as if on a *ſcire feci* there had been no return, the aſe is quite different; and the practice may be much more reaſona- le. It is the intereſt of the party to make the enquiry; and the aw will intend he does it. But an executor may be *totally* ignorant f a judgment againſt the teſtator: If it were allowed *any* judg- nent, creditor might *ruin* an innocent executor. The court never *id* allow this; I truſt the court never will allow it: It would be a eflection on the laws if they ever did allow, on a *ſcire feci* the party s *perſonally* warned; the ſheriff is liable to an action for a falſe re- urn; and therefore on a *ſcire feci* the defendant is for ever conclud- d; and an *audita querela* can't relieve him. Here in this caſe the efendant has immediate ſecurity, perſonal ſervice is not neceſſary, he ſheriff too is *not* liable to an *action* for a falſe return.

Lord *Mansfield*—*How ſo?*

Becauſe, *wherever* the return is a *negative only*, the ſheriff cannot e liable to an action; and ſo it is upon a *non eſt inventus*.

Lord *Mansfield*—Is it ſo? I think I have lately determined other- wiſe.

I was going to ſay my Lord that if the plaintiff can prove, on a *on eſt inventus*, that the ſheriff did *not* execute the writ, then he may have his action againſt the ſheriff, but not the defendant. In theſe *nihils* it is as well known as that there is a ſheriff in *Middleſex*, that the plaintiff *always* ſolicits thoſe returns.

Lord *Mansfield*—It is a *very bad* practice, and ought *not* to be continued; and it does not ſeem to be founded in *reaſon* or *conſiſtent* with *law*, nor with the *opinions* of the court, that the ſheriff may not be charged with an action for a *falſe* return even though *negative*.

Serjeant *Davy*—As to the *equity* of the caſe, there are, they ſay, *equitable* aſſets to which the plaintiff is entitled, what ever they may be if they are not *legal* inſtead of equitable, the court will not *deprive* Sir *John* of his *legal* advantage; and I would only farther ſay, as I would not go over the ſame ground which has been ſo well trod before me, that your Lordſhip will *not* determine upon the proceedings, *ex parte*, without hearing Sir *John*'s evidence.

Lord *Mansfield*—I think, brother *Davy*, what you have dropt may be *exceeding* proper, and tend to prevent expenſive litigations between parties nearly allied. That Sir *John* might be permitted, and *Farral*, to make affidavit of what paſſed in the converſation between Lord and Lord *Mexborough*, concerning giving up the old ſecurity; which was *certainly* a *good* one; and that it may appear *how far* Sir *John* was *concerned* in it either by *himſelf* or the act of Farral.

To be ſure the court regularly adheres to *regular* judgments, if in the ſupport of the *merits and juſtice*; but if AGAINST THE MERIT AND JUSTICE THEY ALWAYS GET RID OF THE MERE FORMALITY OF THEM; but they do it upon terms. I ſee it may be o *great* conſequence to the parties to have this matter cleared up, they may make their affidavit on *Monday*.

Affidavit of Sir *John Delaval* and *Oliver Baron*. *Baron* believe that Sir *John Delaval* was in poſſeſſion from 1764 to 1771, of al Sir *Francis Blake Delaval*'s ſettled eſtate, ſubject to an annuity to Si *Francis* of 2,000*l*. *per annum*; that both theſe deponents have hear Sir *Francis* expreſs his apprehenſions, that Sir *Thomas* would become a bankrupt; he being, as theſe deponents verily believe, i very bad circumſtances at that time. *Baron* ſays, that in purſuance o a letter [from Sir *Francis*,] the deponents and *Thomas* went to *Doddington* on the 29th of *May*, Sir *Francis* entered into an agreemen to releaſe Sir *Thomas* within twelve days from the ſecurity of 10,000*l* to be paid to Lord *Mexborough*. That Sir *John* ſaid he had nothin to do with it, not knowing of the loan; and that he thought himſelf ill-uſed, in not having the ſecurity diſcloſed to him. That Si *John* made a propoſal to pay off Sir *Francis*'s debts, which Si *Francis* ſhewed him an account of; that Lord *Mexborough* was no

among

mong them. That Sir *John* was *aſtoniſhed* at the amount, that he greed however to lend 5000 *l.* to buy in annuities for his brother; ut that he had *nothing* to do with Lord *Mexborough*'s debt; and hat he expreſſed an idea the 5000 *l.* was *too large* for the purpoſe of aying off the annuities; but Sir *Francis* ſaid he muſt have *elbow oom.* That *Farral*, the attorney, aſked Sir *Francis* why he had ot mentioned Lord *Mexborough*, and to which Sir *Francis* replied, e had not mentioned for fear of *over ſetting* the whole. That owever he was perſuaded to propoſe it, and Sir *John* accepted the harge to be made on the eſtate; that *Farrall* was very urgent hat Sir *Francis* might be bound by forfeitures not to marry, and ir *Francis* alſo was urgent upon it; that he Sir *John* ſaid, he hought ſuch *reſtrictions* of marriage were *illegal*; that then Sir *rancis* ſaid you do this to get over our agreement. No, ſays Sir *ohn*, to convince you of the contrary, if you will cauſe it to be nſerted, that unleſs counſel ſhall think ſuch forfeitures good both n law and equity, that they ſhall be void, *there* I will agree.

Propoſals were made that Sir *Francis* ſhould ſettle an eſtate tail upon Sir *John*'s ſon: When they came to town counſel were of pinion, that the reſtrictions were *illegal* and *void*. That the deponent *Oliver* thought he did Lord *Mexborough* a material ſervice in etting Sir *John*'s conſent to ſtand ſecurity inſtead of Sir *Thomas*, nd thus procuring a *good* ſecurity inſtead of what he underſtood a *eſperate* one. That *Oliver* applied to the plaintiff, mentioning a eſign to releaſe Sir *Thomas*, and make Sir *John* ſecurity; that Lord *Mexborough* and his Lady not ſeeming to incline to the exchange, *Oliver Baron* ſaid to them, I think your Lordſhip looſes little or nothing, and may get a very good ſecurity inſtead of a bad one; hat however, they ſtill remaining diſinclined, *Farrall* left them; hat Sir *Francis* ſpoke *earneſtly* to *Farrall* afterwards, and inſiſted upon Lord *Mexborough* being perſuaded by *Farrall*, to conſent to he exchange of ſecurities; ſaying that Lord *Mexborough* was like mad-man if he did not, that the eſtate would be in the hands of he aſſignees if *Thomas* held it ſix weeks longer. That *Farral* refuſed to go unleſs ſent for by the plaintiff, he ſays that Lord *Mexborough* did actually ſend for him, and ſeemed ready to execute; but o his great ſurprize, when the matter came to be diſcuſſed again, nd Sir *Francis* declared the ſecurity of Sir *John* to be as good as the ank of *England*, Lord and Lady *Mexborough* expreſſed an apprehenſion that Sir *John* was to get by the ſecurity.

Farrall repeated that his Lordſhip could looſe nothing by the ſecurity. Lady *Mexborough* ſaid, you may looſe nothing, but *Tom* will be ruined unleſs ſomething is done. That Lord *Mexborough* ſaid, he wiſhed he had never lent the money; and Lord and Lady *Mexborough* ſaid it was very wrong to do Sir *Francis* ſervice, and afterwards reproach him for it. That then his Lordſhip conſented;

but upon the inſtrument being read by *Farrall*, when he came t the words and I acknowledge to have received ſatisfaction, Lo *Mexborough* ſaid he had *not* received ſatisfaction, I wiſh I had. O which the deponent ſaid, my Lord you have only a *chance* of ſatis faction, I can't promiſe you any more. Sir *John* obſerved on th forfeitures being declared *illegal*, that then he muſt not ſuffer th eſtate to be charged with Lord *Mexborough*'s debt, as otherwiſe h ſhould be *tied* and Sir *Francis free*. That the deponent *Farrall* be lieves that the reaſon of Sir *Thomas* and his Lady being unwilling confeſs ſatisfaction on Sir *John*'s ſecurity, and accept Sir *John*'s wa from their apprehenſions partly that Sir *John* would take a benefi and partly from the deponents ſaying that his Lordſhip had only *good chance* for a ſatisfaction, which he *truly* thought.

Sir *John* ſpeaks in confirmation of all this part, and that he ſure Lord and Lady *Mexborough* knew, and he had told Lord *Mex borough*, that by the family ſettlement there was a contingency o Sir *Francis* having children, and therefore he Sir *John* could no make an abſolute ſecurity, till his ſon, who was but ten, came o age. That the intent of making the day of the covenant bear dat with that of the agreement, was not to make *void* the agreemen for 1000*l*. annuity to be paid to Sir *Francis*, for that he admits pay ment due for 1000*l*. That Sir *John* had raiſed 45,000*l*. and ha never taken any benefit therefore during the life of Sir *Franci* That he told Lady *Mexborough*, ſhe knew he had never receive any benefit from the covenant, and that he is informed by *eigh* learned counſel he *can* derive no benefit from the ſame, and is no liable to pay any part of the 10,000*l*. other than from the ſurplus o the 5000*l*. after paying annuities.

Lord *Mansfield*—The manner in which this application is mad *miſled* me the firſt day it came on, for it is ſtated as a *judgment* deb obtained; and therefore an application for an *equitable* relief on thei performing *equity* and payment of coſts. I was therefore miſled t ſuppoſe this was a caſe of a judgment debt obtained, to be relieve on a motion to which there might be an equitable right, as upon a *auditâ querelâ*. And an idea being ſuggeſted to me that this was a *unconſcientious* uſe made by the plaintiff of the judgment, and that i was capable of being turned *unconſcientiouſly* the other way on th matter of form, I therefore thought it right that the affidavits, eſpe cially on Serjeant *Davy*'s ſide, ſhould be entered into. There wa *never* an intention of entering into the *merits*, but putting them int a *way* of being tried. If Sir *John* is debtor, by a *ſpecialty* he can' diſcharge himſelf as being *executor*, nor as *conditional* truſtee; bu in this caſe Lord *Mexborough* has his remedy, not excluded nor pre judiced by this motion.

Suppoſing, as ſeems, that there *was* a condition to be performed the covenant, then if Sir *John*, or *Farral*, his agent, had drawn rd *Mexborough* in, as on a good ſecurity, and abſolute, his Lordſhip uld have had an action on the caſe, for the 10,000 *l.* ſo that re would have been no occaſion for ſetting the matter upon terms; this has been poſitively denied. If the defendant thinks he has y ground to go upon, he is *not* embarraſſed by the form, not- thſtanding his *repreſentation*.

I come now to what I premiſed. I think the defendant has pro- ded *too* candidly: And I think that they ought to have proceeded *ainſt* the judgment, as *unconſcientiouſly* obtained. And therefore, ough it's nothing to the parties, yet, for the ſake of the *practice*, d of the *rule*, I will order the rule, without *payment* of coſts.

The aſſets applied for in *April*—promiſed when applied for—due igence uſed—account delivered in, by which there appears a very nſiderable deficiency—nothing objected—in the mean while, he empted into a judgment of *form*, of which he can know *no- ng*, no notice being given; and it's made a *confeſſion* of *aſſets*, *con- ry* to their *own* acknowledgement.

Now, without prejudice to *practice*, this was done in *Trinity* m; pending the *amicable* treaty between them, the judgment is tained. Now, by way of *reference*, when it operates as *nothing* *t reference*, a *form* merely may be ſufficient: As to this, it's the par- s buſineſs to take notice of it. But when an *executor*, an admi- ſtrator *knowing* indeed of the judgment in this caſe, but who *may* *w nothing of it*, ſhall have been *drawn into a confeſſion* of *aſſets*, by *default*, for *that* is the principle on which it proceeds, in *ſuch* caſe as this, the ſetting aſide the judgment is EX DEBITO JUSTI- Æ, when *ſuch* an uſe is made of it.

I would have it *underſtood* from this judgment, that *no principle* *law exiſts ſo diametrically oppoſite to juſtice*. Upon form, againſt other, it is very well; but by way of *ſerious* concluſion, it is *un- t* and *unconſcientious*. If you would make a *real* uſe of it, you uſt give a *real* notice.

Michaelmas Term

13 Geo. 3. 1773. K. B.

Licence.

MOTION for an information againſt a juſtice of peace, for refuſing a licence to the informant.

An indictment had been preferred againſt the perſon to whom the licence was granted, for ſtopping up the king's highway, but quaſhed. A ſecond indictment was preferred; the juſtice refuſed to quaſh it, and ſaid, if it was quaſhed, it ſhould be in the court of King's Bench.

The caſe ſtated on her ſide was, That an agreement had been made with the complainant for building a bridge; that ſhe, not being paid, nor having conveyance made to her, according to the agreement, within the time agreed, diſcharged the workmen, and ſtopped up the road. That the public had enjoyed the road for ten years; after which ſhe made the obſtruction, and, after applying to the juſtice, he refuſed the licence, without reaſon.

The caſe made on the other was, that at firſt there was no real conſideration, but that it was only agreed that the public ſhould be at the expence of the repairs. That afterwards the juſtice, on her requeſt, agreed to pay 10*l.* to her ſon, as heir at law: That he tendered the 10*l.* but that ſhe, after the public had enjoyed it nine or ten years, demanded a conſideration for the ground, and an agreement to be made between them. That then, on their refuſal to comply with this new demand, ſhe obſtructed the works. And that, as to refuſal of the licence, he was moved thereto, becauſe the houſe had the fame of a diſorderly houſe; and that he has a witneſs, on whoſe affidavit it will appear, that it was a diſorderly one.

And

nd that they had not ſuggeſted that the houſe is neceſſary to the ccommodation of the inhabitants. That if the reaſon ſuggeſted, f the road, had been the *true* one, ſtill he ought not to be harraſſed ith an information: But he poſitively ſwears to the other, of it's eing a diſorderly houſe.

Lord *Mansfield*, when the counſel was about to go on, ſaid, he hought they were very wrong on *both* ſides.

That as to the woman, it appeared evidently ſhe had made an greement, and that a note of hand for 10 *l.* was in her ſon's hands, urſuant to that agreement. If ſhe thinks, after this, and with the ublic enjoyment for *ten* years, if ſhe thinks ſhe can come off, becauſe there was *no* conveyance, (after much trouble and litigation) e will find herſelf much miſtaken, and is very ill adviſed. It an unjuſt attempt.

On the other hand, I can't agree with what was very tenderly nted, that a juſtice of peace may *refuſe a licence becauſe* a party ill not come into *his terms.* She may be ill *adviſed*, and *unreaſonle*; but *ſtill* this will not bear him out in ſuch an application of s authority. It is the caſe of *Naboth*'s vineyard. As to her chacter with reſpect to her houſe, I wiſh *nothing* had been ſworn out it. It appears to me, it would have been as good twenty ars after as twenty years before; for which firſt years he has noing to ſay againſt it, had ſhe not obſtructed the road.

But ſhe ought to have come for an *information* with *clean hands*, d that not appearing the caſe, yet, in compaſſion to the woman, d for the benefit of all parties, I ſhould be glad to hear ſhe would *ithdraw* her *information*, on their granting her a licence, and payent of the 10 *l.*

Mayor's caſting Vote.

Think, of common right, the mayor has *no* caſting vote, but muſt ſupport his claim either by charter or uſage. *Per* Lord *ansfield.*

In Aſſault and Battery.

Briggs *v.* Sheriff Dobbs. *v.* Edmonds nota

DECLARATION, by way of recital, that whereas, *&c.* objected againſt, and *Cro. Eliz.* 507, cited, and *Strange,* 1.

this latter caſe. It firſt began with a recital, and afterwards there was a poſitive averment. And per cu in that caſe, that the objection muſt not be extended, as having gone far enough before, and that the r part good, and the former cured by verdict. Vide the ſame caſe in Lord Raymond, 1413.

Curia—You had better *waive* the objection, as the party will o courſe be permitted to *amend*.

Vide *Bultivant* v. *Holman*, *Cro. Ja.* 537.

Caſe of Hotley *againſt* Scot.

Mr. Dunning *ſtated the Caſe.*

SIR *John Aſtley*, tenant for life, remainder, after intermediate limitations to the now Earl of *Tankerville*, by virtue of Sir *John* marriage with the granddaughter of the then Earl, ſhe being previouſly ſeiſed of the eſtates in queſtion, and others, joined with he huſband to levy a fine, whereon a power was derived to make leaſe in *poſſeſſion*, but not of *future* intereſt, and ſo as it be *incident* to an go along with the *reverſion*; clauſe of *re-entry*, on non-payment o rent, for twenty-one days.

Under colour of this power, Sir *John* granted a leaſe, by indenture, to Mr. *Pritchard*, in 1761, to hold by a yearly rent of 21 with proviſo, in caſe rent ſhould be behind for twenty-one days having been lawfully demanded, *or no ſufficient diſtreſs or aſſignment* that then it ſhall be lawful for Sir *John*, his heirs, or aſſigns, to re-enter: And the rent is alſo reſerved to Sir *John*, his *heirs and aſſigns* Another leaſe, with like proviſo, in caſe of rent behind, or want o ſufficient diſtreſs. By attending to the terms of the reſervation, yo will ſee the objection, which is the power of re-entry being to Si *John*, his *heirs and aſſigns*, whereas it ſhould be, by the *terms* o the power after his deceaſe, to the *reverſion* or next remainder-man

Second objection, that whereas the re-entry is by the power unclogged with the neceſſity of *demand*, or *failure of diſtreſs*, Sir *Jo* has burdened it with theſe. Had Sir *John* reſerved a power to himſelf in a fee, which was his own, I think the objection would b *fatal*; much more ſo, as the power is from his wife, and the clogging is to the prejudice of his *grandſon*. The caſe of *Brooker* an *Merrick* will be objected, where the conſtruction was held of th words of the ſtatute of *H.* 8. with reſpect to rent reſerved by tenan in tail, where *heirs and aſſigns* will be taken to be ſuch as ſhould become entitled to the reverſion in the family ſettlement; but the ſtatute does not ſpeak any thing of the remedy, the power does.

And though the conſtruction may avail, as to the rent, it canno as to the title. Lord *Tankerville* is in by a title *paramount*, and th only one under which Sir *John* derives, and which the granddaughter of his anceſtor, Lord *Tankerville*, *certainly* meant to reſerve t him; which *cannot* be as *heir* or *aſſign* to Sir *John*, and which Sir *John* ſeemed to think, quite forgetful of the power.

Lord *Mansfield*—I ſhould be glad to know if the words ſtated are precifely, "*ſo as in each leaſe there be a clauſe of re-entry, if the rent be unpaid for twenty-one days.*

This was admitted.

Mr. *Bearcroft*—With reſpect to the other leaſe, *Pritchard* and *Whitfield*, I doubt my *duty* to the *court*, and *myſelf*, will not permit me to argue that a *die datus*; that of re-entry in thirty-one days: That, ſtill more, of the eſtate for life exceeded.

Lord *Mansfield*—To be ſure, a *die datus* is a *ſettled point*, and *cannot* be *departed* from. If it were *now open*, I ſhould incline to conſtrue *excluſive* or *incluſive*, as would beſt ſubſtantiate the deed; for the expreſſion is very ambiguous.

Mr. *Bearcroft*—I am perſuaded his Lordſhip means to take exceptions of form, to ſhew his generoſity, in granting new leaſes upon the ſame terms.

As to the object, with reſpect to the re-entry, I underſtand it is admitted, the remedy for rent will be the *ſame*. And how is this objection to be ſupported, upon a fair and liberal conſtruction? And it is agreed, with reſpect to powers of this ſort, the court will conſtrue as *liberally* as a court of *equity*. Let me then be admitted, as they ſupport their cauſe by a *liberal* conſtruction, to ſupport mine by the *ſame*. As to the word "*heirs*," I cannot underſtand Lord *Tankerville* as an *heir*, certainly; but if I can make him out to be an *aſſign*, it will be ſufficient for your Lordſhip's determination. I know not there is any technical definition of the word *aſſign*. Now Sir *John*, joining with his wife, may be properly conſtrued as grantor; and Lord *Tankerville*, if he has a right of re-entry, (which ſure he has by law, and of which the tenant will be cognizant) he has the right as an *aſſign*.

Let us conſider as to the operation of the power of re-entry. I contend it adds *nothing* but what comes in by force of law, or follows upon a deficiency of the vague and not ſufficiently explicit words of the power. Is not rent *always* to be demanded, before a diſtreſs becomes liable, or a forfeiture incurred? And as to the other, if there be a *ſufficient* diſtreſs, what then? The rent will be recovered *without* re-entry; and neither in *reaſon*, *equity*, or *conſcience*, could there be any other *intent* of the *original* power. In ſome reſpects, Lord *Tankerville* has an advantage; as for inſtance, without clauſe of re-entry is improper, and rigorous, the power complained

of

of defends the perſon. And the attorney who drew the leaſe was the very perſon to ſtart the objection.

Mr. *Dunning*, in reply—I don't apprehend the nature of the caſe, or Lord *Tankerville*'s character, makes it requiſite for me to inſiſt on indulgence. As to *him*, his character hath hitherto ſtood unimpeached, and will ſtand unimpeachable. As to the attorney, he may appear, when I have ſtated the whole, to merit *approbation*. He drew it as for a man ſeiſed in fee; he never was informed otherwiſe till after Sir *John*'s death. He diſcovered the flaw to his *own* prejudice, as having a very beneficial leaſe. I do not deny that it would be very *abſurd*, if, in the conſtruction of *powers*, this court differed at all from the *court* on the other ſide. With reſpect to the caſe cited, or rather *hinted*, I gave it up, becauſe I thought it ſhortened my queſtion. If it had appeared material to my client, I ſhould have done wrong not to have obſerved to your Lordſhip, that *there* the conſtruction was *ſecundum ſubjectam materiem*; heirs *ſpecial*, not heirs *general:* But *here*, the conſtruction would require, that your Lordſhip ſhould take as *heir ſpecial* him who is *no* heir *at all*.

With reſpect to the term *aſſigns*, Mr. *Bearcroft* ſaid, there was *no* definition: It may be difficult to attempt a *definition*, as being too *clear to need* or *admit* one. However, I may thus far take for granted, by way of definition, that an *aſſign* is one who can take an aſſignment from a perſon *qualified* to make it. It is not *incident* to a reverſion: Does it any where ariſe from the *contract?* As to the diſtinction between the power given, and the power purſued, taking the original power of re-entry in the moſt *liberal* conſtruction, (for I ſhould be aſhamed to make a *verbal* one) I think it is impoſſible to maintain the conſiſtency of the latter with the former. There is but one condition in the former; no clauſe of re-entry. In the latter there are three conditions, of which only the *firſt*, the rent being behind, is the condition of the former. Can it ever be *ſeriouſly* contended, theſe powers are *ſubſtantially* and in effect the *ſame?*

Lord *Mansfield*—This is to try the validity of a leaſe, made in execution of powers.

The ſtate of the caſe is, *Mary Prince*, who married Sir *John Aſtley*, was ſeiſed in fee of the premiſſes, and levies a fine; and afterwards made a ſettlement: And there is a power to Sir *John Aſtley* to grant leaſes of *preſent* and not of *future* intereſt; ſo as it go along with and be *incident* to *remainder* or *reverſion*. And ſo as there be a clauſe of re-entry, in caſe of rent being behind twenty-one days.

There is a power of revocation.

All the uſes ſubſequent to Sir *John*'s eſtate for life were *revoked*, nd the Earl of *Tankerville* is become entitled, as remainder-man. ir *John* is dead. Then comes the leaſe in queſtion, with reſerva- on of rent, and clauſe, in this manner; that is to ſay, with re- ntry, on condition of the former nature, if rent *unpaid* for twenty- ne days. There are one or two objections; firſt, that the *mean- g*, though not expreſſed in the words, is, that clauſe of re-entry hould go to the *inheritance*; that it does not if it goes to the *heirs eneral* of Sir *John*.

To prove that, by the power, it ought to be reſerved to the inhe- itance, was not difficult: By the ſubject matter it *muſt* go along with he rent, and be incident to the reverſion.

Nobody can have the *re-entry* but he who ſhould have the *rent*, ere there no leaſe; and ſo in the very text of *Littleton*, *Co. Lit.* 13. *ſ.* 346, 347; by *conſtruction* therefore it muſt be ſo. Now pon the conſtruction of the leaſe it's reſerved for twenty- ne years, *payable half yearly*, (that is the ſame as if it had been luring the term) and then it goes with the inheritance. Then, hat is the meaning of *heirs* and *aſſigns*, it muſt mean (it was ad- nitted, of neceſſity, at the bar) thoſe to whom the *inheritance* hould go, and ſo is the *reaſon* and *authorities*. The heirs and aſ- igns *can* have no other meaning. It would be *ſuperfluous* to expreſs he meaning more particularly; as in the caſe in *Sanders*, of a cove- ant reſerved to a ſtranger, his *executors* and *aſſigns*, the court de- reed, it muſt go to the deviſee, and *executor* muſt be rejected.

Why then, as to the reſervation in the other part, how was it to ave been worded? They ſay *expreſsly*, to the perſons in *reverſion*, nd *remainder*. It would have been *void* on the ſtatute 34 *H.* 8. . 24, if they were *not* aſſigns to the leſſor by the ſettlement, hey are aſſigns a thouſand ways: They have provided ſufficiently. s to demand, a clauſe of re-entry is required, as a ſecurity for the ent: Demand is requiſite, both by common *law* and *ſtatute*: A clauſe of re-entry will *never* be allowed to operate *farther* than as a *ecurity* for rent.

New Trial.

NO intereſt had been paid upon a bond from 1754 to 1773: The jury found for the bond. Lord *Mansfield* ſaid, the *preſumption* againſt the bond was within *no* ſtatute of limitations; would be governed by the evidence. A *parol* confeſſion would ſet up a ond twenty years hence. That he remembered, from *circumſtances*,

ces, the evidence of *ſeventeen* years had been taken as preſumption ſufficient againſt a bond.

The court granted a rule to ſhew cauſe, in order to inquire farther into the circumſtances. *Quæras velim amplius de hâc cauſa lector bone.*

Action for Money had and received.

It was obſerved, this was a *liberal* action, in which the party waives all tort, treſpaſs, and damages. As in a caſe of laſt term, (vide *Feltham* and *Tyrrell)* where it was rightly argued, you may waive the treſpaſs and damages, where there is a treſpaſs, and come for the money *had* and *received.*

But where an *attorney* has taken a receipt, and diſcharged defendant out of cuſtody, he charges *himſelf* with the whole, and *acknowledges ſatisfaction*, and *can't* plead, that *no more came* to his hands than ſo much, and in that way clear himſelf of the reſidue.

Recital.

With reſpect to the "*whereas*," which was argued in declaration of aſſault and battery, the court was informed that exception was done with.

It was obſerved, that in *Fielding* and *Vincent*, it was firſt deviſed how to get clear of this objection: That the caſe of *Wilder*, in *Strange*, 1151, had farther ſhaken it. And that three terms after, the caſe of *Marſhall*, 1162, made an end of it.

New Trial.

Motion for a new trial, on account of verdict againſt evidence.

Queſtion, Whether an attorney exerciſing the buſineſs of a *ſcrivener* was a *trader*, within the ſtatute?

Suggeſted that, upon the evidence, the jury ought to have found him a trader.

Rule to ſhew cauſe.

Civil Action.

CHARACTER of the defendant cannot be gone into in a civil action. Lord *Mansfield*.[‡]

Recognizance.

MOTION for a *certiorari* to remove a recognizance—Not granted as never having been the practice; but inſtead there-f rule to ſhew cauſe granted, why the clerk of the peace ſhould ot diſcharge the recognizance on payment of the fees.

Rule.

THE court will not oblige a perſon to give a copy of a declaration which has come into his hands without fraud or ſur-rize, and without which the proſecutor cannot proceed againſt him *riminally*. For the court will not *oblige* a defendant to aſſiſt in a roſecution againſt himſelf.[*]

Adminiſtration.

TAKING out letters of adminiſtration on a falſe oath, is with reſpect to ſeamen a capital felony by the ſtatute.

Venue.

AFTER plea pleaded you can't move to change the venue.[†]

Attachment.

MOTION for attachment, for non-performance of an award made in purſuance of a rule of court.

Rule to ſhew Cauſe.

[‡] In capitalibus extenuat aut excuſat delictum quod non item in civilibus.

[*] Nemo tenetur ſeipſum accuſare.

[†] Omnia ordine et decenter fiant

Allegans contraria non eſt audiendus.

Slander.

DECLARATION ſtated, that whereas the plaintiff i a wool-comber, and a perſon had agreed with him for a certain quantity of wool, the defendant well knowing of the premiſſes, and in order to bring him into diſcredit with perſons buying and ſelling with him, and deprive him of his livelihood, ſpoke the words laid in the declaration, he (*innuendo* the plaintiff) is not worth a penny, and he will run away.

2 *Shower*'s Reports, cited " he is an idle raſcal, and not worth a " groat;" actionable if ſpoken of a trader. *Rolls* abridged in the very caſe of a wool-comber, " buy no more wool of him, for he " is not worth a penny."

It was ſaid as to the averment, it was ſufficiently averred for the court to ſee that the plaintiff was a wool-comber, and got his money by buying and ſelling in that trade; as in the caſe in *Bronlow*'s Reports, plaintiff ſtates, that whereas he is a judge, defendant not being ignorant of the premiſſes—held a good averment.

Mr. Serjeant *Davy e contra*, that the words were not actionable for that wherever a man not neceſſarily lives upon his trade, or ſo as to be liable to the ſtatutes of bankruptcy, ſlander lies not fo ſaying he is not worth a groat.

3 *Mod. Chapman* and *Lamphire*, a carpenter deſcribes himſelf t be ſuch, and then ſtates, that he got much money by buying o timber and materials, and building of houſes, and that the defendant ſpoke of him as follows, " he is broken and run away and wi " never return again," which is much the ſame as ſtated here, an the judges were divided, two againſt two, whether theſe words wer actionable or not. *Anderſon* and *Fairfax*.

Action lies not for ſuch words ſpoken of a farmer; unleſs he declares ſpecially, that he gets his living by buying and ſelling.

They would not be actionable if ſaid of a vintner, nor of a ſhoe maker; [this laſt the court denied] becauſe not liable to the bankrupt laws.

In the caſe 2 *Shower* 295, the words were ſpoken of a weaver; an the caſe ſtated ſpecially, that he got his living by buying and ſelling

It is not ſufficiently ſtated here that any body traded with him, o he with any body.

Th

The court thought otherwiſe: And that a wool-comber, not ſtated to be a labourer, muſt of neceſſity be intended to buy wool to work with.

A *farmer*, the court obſerved, was *no* trade at all; which muſt have been the reaſon of the deciſion cited above.

The court further ſaid, that they would not diſturb the caſe, *eſpecially* after verdict.

Information.

COURT will not proceed by way of information for every diſobedience of a conſtable to a warrant of a juſtice, or order of ſeſſions, but the method of proceeding is by indictment.*

Irregularity.

IN general you muſt come upon an irregularity at firſt, and not wait for a ſecond, to ſet aſide the antecedent. Irregularity of rule is to be taken notice of the moment the next ſtep is to be taken. Irregularity of declaration in the ſame manner, before judgment. And ſo is the rule in the court of Common Pleas; and this on principles of juſtice, and for prevention of expence. You can't come after *execution*, to ſet aſide judgment, on account of irregularity of the *declaration*: But the inſtant you have notice of judgment ſigned, you muſt take advantage of the irregularity, then at leaſt, if not before. §

Trover.

MOTION to be at liberty to plead ſeveral matters in an action of trover.

COURT—By a book, near two centuries ago, it appears, *releaſe* is a ſufficient plea to *trover*, and you have no need to plead any thing more.

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* Nuſquam recurritur ad extraordinarium niſi ubi deficit ordinarium.

§ Vigilantibus non dormientibus jura ſubveniunt.

On the 31 *G.* 2.

ON a queſtion, Whether lime was within the act.

The act provides, that no perſon ſhall be liable to pay toll fo any cart or carriage, or horſe, *&c.* which ſhall be employed in carrying dung, *compoſt*, mould, ſoil, *or any other thing*, employed i the cultivating or *manuring* of lands. Pleaded, that *lime* was within the ſtatute.

Objection, that lime was not within the exemption.

Ex etymologia.

1ſt, That lime could *not* be comprehended within the word *dung*, *mould*, or *ſoil*; neither, *a fortiori*, within the word *compoſt* which neceſſarily implied a thing, in the making of which ther was more than *one* article employed, and properly ſignified ſomething artificially *compounded*. Lime is a ſimple article, and is, ſurely not compounded by being burnt and brought to diſſolution; which would rather *decompound* it, if it were a compoſition before.

Ex verbis antecedentibus.

The general words "any thing uſed in cultivating or manuring "of lands," muſt be referred to the *antecedent* words, which ſpeak of *harrow* and plough, and muſt be underſtood to mean things *ejuſdem generis*, inſtruments of huſbandry.*

Ex ſtatutis in parx materia.

Farther, that lime is *always* comprehended in expreſs words, where it is meant to be *exempt*.

Ex abſurdo et inconvenienti.

That nothing will pay, in this inſtance of the turnpike road of *Lynn Regis*; for lime is almoſt every thing that paſſed there.

On the other hand, it was contended, that the legiſlature uſed as general words as poſſible; clearly intending to comprehend *every* ſpecies of manure, and that if the exemption did *not* include lime, it would be totally *nugatory*. To the objection, that then no toll will be taken; for that nothing elſe was carried on that road but lime, it was anſwered, that this is only a branch of the general turnpike road.

That the words and intent of the ſtatute *both* concurred to exempt lime; for that the clauſe firſt exempts all inſtruments of huſandry; next beaſts and carriages for the conveyance of ſuch imple- ents; then ſeveral kinds of manure, ſpecially named, by way of troduction to the general words, and then generally, in the moſt *niverſal* extent, *any other* thing employed in the *manuring* or *culti- ation* of lands.

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* Verba intelligenda ſecundum ſubjectum materiem.

Verba generalia reſtringuntur ad habilitatem rei vel perſonæ.

That the action was brought againſt the agent of the commiſſion- s, whereas it ſhould have been againſt the commiſſioners them- elves. And that this was ſtronger than the caſe of *Evans* and *Sad- r*, for the money had been paid back.

Lord *Mansfield*—It has very properly been obſerved, that where e legiſlature meant to exempt lime, they have *expreſsly* exempted by *name*, as in the ſtatute of the 7 *G*. 3. and the circumſtances f this caſe give an additional ſtrength to that objection, from it's eing the *general* manure.

It would be *confounding* the ſignification of words, to ſay *lime* is gnified by compoſt.

It is *abominable* to make a *catch* by plea, in abatement to the in- ictment, on account of the *name*. And, as to the other miſtake filing it, if I had thought there had been any thing in it, I would ave ſent it back to be filed again.

I dare ſay, the commiſſioners *defended* to the action, and then it ould have the ſame effect as if brought againſt them.*

Beſides, if there were any weight in the objections, they come now o late for a nonſuit.

Trover.

Atkinſon *againſt* Barnes.

GOODS of *A*. aſſigned to *B*. and *C*. *B*. ſells them to *D*. who gives a promiſſory note, payable in fourteen days. Af- r this *D*. aſſigns to *E*. all his goods.

The note having never been paid, *B*. refuſes delivery.

D. brings *trover*, affirming that the *giving* the *note* was *payment*; nd that thereby the property *veſted* in him.

Gibſon and *Ware* cited. Property aſſigned from a man of *Dant- ick* to a man of *Berwick*. The man became inſolvent.

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* Omnis ratihabitio retro trahitur et facto æquiparatur.

An agent of his found means to come for the goods, which wer ſent by a ſhip. The ſeller gives notice to the captain of the inſol vency, and, upon this, the captain refuſes to deliver them; and ac cordingly they were not delivered into the hands of the agent.

That here *Atkinſon*, the aſſignee of *Cheſter*, the buyer, could hav no better right than the buyer. That *Cheſter*, the buyer, had *n* made *payment*; for a *note* was *no payment*, till ſatisfied, and was onl a *proof* of the *ſum* the goods ſold for. *Barnes*, the *ſeller*, kept th poſſeſſion of the goods, by the *deſire* of *Cheſter*, the *buyer*, till a tim agreed on: And, upon this, it was contended, that the poſſeſſio of the ſeller, in conſequence of this agreement, was the poſſeſſio of *Cheſter*, the buyer.

To this, Mr. *Mansfield* replied, that if it had been a delivery t a *third* perſon, it would have been ſo; but that here it was no mor than muſt be the caſe where goods are not immediately delivered.

Lord *Mansfield*—You need not give yourſelf any trouble; fo the *whole* of the argument goes, I think, upon a miſtaken founda tion: That this was only an *inchoate* ſale, and not *perfect* by deli *very*.

Theſe are the goods *Stephens* ſold by *Barnes*: There is a *not* giving credit to all the world, that they were ſold to *Cheſter*. *Cheſ ter* was to enter into the houſe, and deſires that *Barnes* would l them ſtay, not to give him the trouble of removing them. *Barn* agrees; they ſtay as furniture: And more than this, *Barnes* blow *hot* and *cold*; for he does not wait delivery of poſſeſſion till the not be paid, but ſends the goods to *Cheſter*.

After this *Cheſter*, not being *ſolvent*, applies to *Barnes*, and de ſires he would take back the goods. *Barnes* ſays, "I will *not* tak "back the goods; I will have payment." Upon this *Cheſter*, as h had a right to do, ſays, "I take this as a *complete* ſale; and yo "muſt abide by it as ſuch." Mr. *Barnes*, therefore, ſhall not plea that there was *no* complete ſale; having affirmed one by refuſing th goods, and demanding payment.*

Farther, he *indorſes* the note to an indorſee; though he afterwar ſtruck him out.

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* Quilibet ſua facta ſcire et præſumitur et debet.

Allegans contraria non eſt audiendus.

Original.

IN a caſe where parties, who were perſons of conſiderable property, were proceeded againſt by *original*, inſtead of bill of latitat, Lord *Mansfield*, in a very ſtrong and lively manner, expreſſed his indignation at the *oppreſſion* uſed againſt the ſuitors of this court, through compulſion by clients ſometimes, and at other times through the paſſions of thoſe who were employed in the cauſe.*

If the parties will not *conſent* to *appear*, if they *refuſe* to conſent not to bring a writ of error, you may have great reaſon to proceed by *original*; but to do it in the *firſt* inſtance, eſpecially as it was ſworn on affidavit that the parties *offered* to *depoſit* the money in court before the original ſued out, in *ſuch* a caſe, a method of this kind was highly cenſurable. That, on firſt being informed, as far as *entreaty*, *objection*, and *declaration*, could go, he had gone; and if he had thought himſelf *authorized* to have made an *order* to prevent ſuch method of proceeding, in *ſuch* a caſe he ſhould have done it very *gladly*; but did not think himſelf empowered.

However, that it was *deſtructive* to the parties themſelves *ſo* proceeding; and ſeemed to intimate, that on a verdict he had more than once, in ſimilar circumſtances, threatened to leave it to the jury, whether it was not a proper motive for them to encreaſe the damages.

In this cauſe there were *twenty* defendants. Againſt *one* they began by ſuing out latitat: Againſt all the other *nineteen* they ſue out ſo many *originals*. The attorney complained, and *owns*, by his affidavit, that he *diſapproved* ſuing by original, under the circumſtances; but that his clients choſe it. It does not appear, however, that he ever adviſed his clients *before* not to do ſo, though he remonſtrated *afterwards*. It was ſaid farther, that whereas a bill ſued in the Exchequer was the cauſe alledged, the bill was ſued three days *after* the original. If any thing ſo abſurd as delay could have been apprehended in parties of character, and in ſuch circumſtances, why proceed by latitat in the firſt, which was to try the merits?

Lord *Mansfield*—There is no manner of doubt, but that a man may make uſe of *legal* proceſs (legal in the *ordinary* courſe of proceeding) in ſuch a manner as ſhall be a *contempt* of the court, and a moſt grievous *oppreſſion*.

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* Eſt quiddam perfectius in rebus licitis.
Summum jus ſumma injuria.

I remember a caſe of Mr. *Hanbury*, who had bill with his coachman. There was a difference about ſome extra work; the bill wa not *immediately* paid; the coachman, to be revenged, got his maſte to be taken into arreſt about nine at night; he was carried to ſpunging houſe. He ſent to me. I tried to conſider, whether h *could* be taken out; but the proceſs iſſued out of the Common Plea and I could not, therefore, get him out. It came before the Common Pleas, who *committed* both the *bailiff* and *coachman*.

So a *tenant* waiting for his landlord, on the *day* of *payment* h could not find him. The landlord *arreſted* him *next* day. Th court of *Common Pleas* made him *pay* the *coſts*.

So on *arreſt* of a *merchant* on the *Exchange*; the court, on lik grounds, *committed*.

Here I am glad to hear Mr. *Malliſon* adviſed his client not to proceed. But they, hearing there had been a proceeding inducing charge of felony, [the underwriters of a policy of inſurance ha ſummoned the maſter of the veſſel to appear and anſwer before Si *John Fielding* for the *wilful* loſs of the veſſel] they, to have thei revenge, proceeded by *original*.

On the other hand, proceedings in the Exchequer, for a *diſcover* which may charge parties with a *felony*, are *extraordinary* indeed.

Certificate.

CERTIFICATE of marriage not evidence, unleſs it b ſhewn as a *copy* from the *pariſh regiſter*.

Bail.

A Man cannot be objected to as bail, for not having been aſſeſſe to the *poor's-rate*; for it is only evidence of his being a houſekeeper.

Evidence.

ON a queſtion, Whether a promiſſory note, in the hands of a *executor*, were the *teſtator's hand-writing*, he *refuſed* to *produce* the note.

Lord *Mansfield* informed him, that if it had been at *niſi prius*, which had turned on ſuch a matter, he would have ordered the cauſe to *ſtand over*.

The attorney who *drew* the will was interrogated, whether he would make affidavit, that he *believed* it was *not teſtator's* hand writing. He *declined* doing it; but would have *falſified* the hand by *other* witneſſes: This the court declared would be *abominable*, and would not *ſuffer* it.

Execution.

WHERE a judgment is above a year old, you can't proceed to *execution* upon it, without firſt *reviving* it by ſuing out *ſcire facias*.

Non Procedendo.

YOU cannot have a *non procedendo* for want of *tranſcribing*, till you have firſt a *certificate* from the officer in the Exchequer, that there is *no tranſcript*.

Attorney.

LORD *Mansfield*—I don't know whether it would not be a *good* rule, for the maſters of each ſide not to allow an attorney any *diſputed* items, if he ſays he does not keep books.

Summary Proceedings.

AN application in a *ſummary* way waives *treſpaſs*, as an action for money had and received waives damages.

Warrant of Attorney.

WARRANT of attorney given by a *feme ſole*. She afterwards married. The court granted leave to enter up judgment in the name of the huſband and wife.

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* Qui æquitatem orat, is et præſtet.

Payne *againſt* Hill.

Building Act.

IT ſeems, that by the conſtruction of the 12 G. 3. the offence committed as ſoon as the *wall* is finiſhed, in a manner contrar to the act; but at leaſt, when the *ſhell* is finiſhed, after which, nothing done to the inſide can make an alteration; eſpecially as th action is to be brought within three months.

Limitation.

IT was obſerved, that a year was the common limitation in ac creating penalties, where a moiety went to the informer, and moiety to the poor of the pariſh.

Broker.

ACTION brought by a broker in his own name, for hi principal. The jury found accordingly for the principal Contended, that verdict ſhall not be diſturbed becauſe action in th name of the broker.

That a broker is a ſufficient agent for the parties, within the meaning of the ſtatute of frauds; and his note a ſufficient note to bin the bargain: Eſpecially as the defendant made credit with the *Ea* *India* company on this note.

That in chancery, where the defendant might have availed himſelf of the ſtatute of frauds, if he anſwers to the bill, inſtead of demurring, the court of chancery will decide according to the equit of the caſe.

That where a contract is in part *executed*, court of Chancery wil decree a *ſpecific* performance.

That where note is ſigned by one party, but in poſſeſſion of th other, there are ſeveral caſes that both ſhall be bound.

Hatton and *Grey*, Chancery caſes, 264. *Vern.* 221. [Sir *Jame* *Lowther* and *Carill*; but note here, the court did not abſolutely decide] 2 *Eq. Ca. Abr.* 45. *qu. v.* 20.

Where an agreement made by parol, and there is evidence of t parol agreement in writing, this is ſufficient to bind the con- ct.

Counteſs Dowager of *Montacute* v. *Maxwell, Str.* 236. [Note, re the ground ſeems to have been that the marriage was had in *ſideration* of the promiſe.]

[But vide *Peere Williams,* 618, where the ſame caſe is reported, d determined, that to make the marriage a performance in ſuch ſe, would be directly againſt the meaning of the ſtatute.]

That the deciſion in a court of *law* would be the ſame on the tute of frauds as in a court of equity, as to the rules which would vern it, though the method of applying for relief, and the mode giving it, and the ſubject of juriſdiction, might differ.

Lord *Manſfield*—Queſtion is, Whether this caſe is within the ſta- te of frauds?

The very *title* and the *ground* on which that ſtatute was made, have en the reaſon of many exceptions againſt the letter of the ſtatute.

And I agree, that *every* conſtruction of the ſtatute which would *good* in a court of *equity*, will be good in a court of law: For *uity* can't relieve, *againſt* the legiſlature; and every court of *law* is ound to conſtrue *according to* the intent of legiſlature.

Vide the great caſe of Cowper *and* Cowper, 2 Peere Williams, 685, 686.

I have already ſaid if the party owned in writing, the caſe of *atton* and *Grey* would hold here.

As to *parol* evidence, ſuch would let in a great tempeſt of perjury; ut there is *no* occaſion to *parol* any thing.

This man is the broker that buys for the defendant; this is the an that buys for the *Ruſſian*, the plaintiff.

When they go on ſpeculation, one man goes and commiſſions the roker to buy, at ſuch a price, for he thinks it will riſe; another omes to the ſame broker to ſell, for he thinks it will fall.

But then there is no evidence, you ſay, of the order. The note, f which the defendant availed himſelf before the *Eaſt India* company, ſays, " I have bought, [ſtating the quantity and price] by " *your order*, and upon *your account*, for myſelf."

If there were any doubt, which would not be ſufferable when th man has availed himſelf, *parol* evidence came very properly.

The ground I go upon is, that it is by an *Agent who acts by Au thority, and whoſe Note in writing is the Note* of the *Parties*. Th *will take it out of* the *Statute of Frauds*.

Farther, if it were *neceſſary*, it is out of the *Statute*, becauſe *Note ſigned* by *one*, and in *poſſeſſion* of the *other*, *amounts*, *in this kin of caſe*, to the *ſame* thing as if the party in *poſſeſſion* had *ſigned it*.

Mr. Juſtice *Aſton*—In ſuch caſes, they ſhould not charge in de claration upon *parol* evidence merely; unleſs, as here, in ſupport o his *acceptance* of the note.

Mr. Juſtice *Willes* ſpoke principally of the *acceptance* for the de fendant. If he had not meant to be bound, ſhould have immediately returned it.

Mr. Juſtice *Aſhhurſt*—That, in the truth of the caſe, the *Ruſſian* and not the broker, was the buyer.

Vide the caſe of *Colt* v. *Netervell*, 2 *Peere Williams*, 304, 308.

Common Pleas, 18 *Nov.* 1773.

ON a motion for a new trial, in ejectment, the court obſerved they were always very ſtrongly inclined in favour of the poſ ſeſſion; and in courts of *law*, as well as in courts of equity, th tenant is conſidered as a purchaſor, for valuable conſideration.

Plea.

ACTION on the caſe on promiſes. Rule for liberty to plea *non aſſumpſit* generally; and the ſpecial plea of the ſtatute o limitations, *videlicet non aſſumpſit infra ſex annos*.

Declaration.

IT ſeems to be the rule, that declaration is *not* to be delivered to th party himſelf, when there is an attorney.

Plea.

F a plaintiff has a right to demand a plea in *Trinity* term, and omits to demand plea during the whole vacation, queſtion, whe- her this was not giving the defendant farther time.

Per curiam.

It is the practice of the court, that a delay to demand a plea does ot hinder your ſigning judgment the day after you demand your lea.

Irregularity.

YOU muſt not overpaſs a term, and, on account of irregularity, avail yourſelf next term.

But Mr. Juſtice *Blackſtone* ſeemed to have obſerved, that you ight wait till the other party ſigned judgment, and ſhewed that he eant to make uſe of the irregularity.

Declaration.

BEFORE appearance declaration cannot be taken to be in *chief*; but muſt be *de bene eſſe*, or nothing.

Irregularity.

IN a caſe where a party who appeared to the court not to have *merits*, complained of being ſurprized by *ſomething*, which he alled an *irregularity*, on the other ſide, and of which he had de- ayed to complain in the uſual time.

Per curiam.

If there has been a *ſurprize*, all the conſequence is, they have een ſurprized into doing *juſtice* earlier than they *intended*.

Appearance.

IT ſeems to be a rule in the Common Pleas, that when plainti
has entered an appearance for the defendant, all *ſubſequent* notic
muſt be delivered to the defendant *himſelf*.

Replevin Bond.

QUESTION, upon application to relieve from the *penalty* o
a *replevin bond*, it was much *doubted*, whether ſuch relief *coul*
be *extended*.

B. R. 19 *November* 1773.

Bail.

TO be put in on the return day of the *diſtringas*; for you can
move till the next day.

Mayor and Burgeſſes of the Town of Berwick upo Tweed *againſt* Johnſon.

ACTION of treſpaſs on the caſe on *Letters Patent*, grante
in the ſecond year of *James* the Firſt to the Mayor and Bu
geſſes of *Berwick upon Tweed*; which letters were read in cou
verbatim, and were in effect as follows, as to the point in queſtio

" That no perſon not of the *gild* ſhall make merchandize with
out the conſent of the Mayor and Burgeſſes."

" And that *no* ſtranger, without the *gild*, ſhall ſell, except i
" groſs, within the ſaid borough, &c. unleſs by the conſent as afor
ſaid.

Act of parliament 2 *Ja. c.* 28, confirming the charter, and pr
viding, that no perſon who is a ſtranger, *extraneus*, ſhall make me
chandize, &c.

The defendant was a native of *England*, had lived twelve yea
in *Berwick*, and ſerved the public offices; and upon his carrying o
trade within *Berwick*, this action was brought.

Argued, that at this day ſuch a charter would *not* be *good* at *Common Law*.

Yet that not every charter not according to the courſe of the common law, is void; for there are many cuſtoms *derogatory* to the *common law*, which may be preſumed to have taken riſe from the charters of ſome or other of our kings.

It muſt have been obſerved, that by the 16 *R.* 2. and other ſtatutes, *no* perſon may *buy* or *ſell* in *any* city, who is a ſtranger.

And that the king's charter to the contrary ſhall be void.

The caſe, therefore, is to be conſidered on the act of parliament, entitled, "An act for confirming the King's charter to the Mayor "and Burgeſſes of *Berwick upon Tweed*." It cannot be ſaid, that the only intent was to make the charter good againſt the King, his heirs, and ſucceſſors. It ſtands generally and abſolutely to confirm.

Long cotemporary uſage may *juſtly weigh* in the expoſition of a *doubtful act*, or *doubtful point*; but *ſure*, it *cannot* be applied to *ſubvert* the *expreſs*, *plain* ſenſe of an act which *binds* the *King* and his *ſucceſſors*, and this court.

It was conceived, the benefit of this act might be *waived* for a time; and, to prevent *prejudice* to the *right* from this *non uſer*, it was *provided*, that *perſons excluded* by the former part might make, and *carry on*, their *merchandize*, with the *good will* and *liking* of the *Mayor* and *Burgeſſes*. They knew this *indulgence*, or *connivance*, might be determined whenever the Mayor and Burgeſſes ſhould chooſe; and had *no* idea, an act of parliament (eſpecially with this proviſion, not neceſſary, indeed, but added, *ex abundanti cautela*) could become *obſolete* by any negligence or connivance.

That *nemo mercator qui ſit extra gildam*, and *nemo mercator qui ſit extraneus*, are words tantamount: And that the parliamentary *confirmation expreſsly* extends to every thing *granted*, or *meant to be granted*, by the *charter*.

Mr. *Dunning*—That the caſe having been *fully* ſtated, he ſhould only enquire whether Mr. *Johnſon*, having lived *twelve* years in the town, having ſerved *all public* offices, and borne *all* the burthen, ſhould be reſtrained, by the *conſtruction* of this act, from partaking of the benefit.

Nullus mercator qui ſit extraneus muſt be underſtood of a merchant *Alien*. There are a *multitude* of caſes where they are ſo interpreted;

terpreted; and *none* that I know where they ſtand for men who ar not *freemen* of the place, *ſimply*, without *other* words.

If any *other meaning* be given the words of this charter, this charter would be *illegal*; and then, according to the general rule, when there are two conſtructions, the *legal* will be admitted.* If this extends to all the King's dominions, and was not ſupported by a precedent ſtatute, it will be *void*; but if it is reſtrained to aliens, it wil be good, and conformable to the 16 *R.* 2.

But you will ſay, why, if there was an act of parliament *alread* was this granted as a *ſpecial* privilege? I do not know how far th particular ſituation of *Berwick* might *exempt* the town, or be *ſuppoſed* to exempt it from the benefit of the *general* act; but I don't reſt my cauſe upon that point: I think I ſhall be warranted to maintain my caſe, if I *prove* that *nullus qui ſit extra gildam*, and the other, *mercator extraneus*, are two *different* qualifications; and that the latte extends not to *natural born* ſubjects of the King, *reſident* within th town of *Berwick*.

That this act will have a *different* conſtruction from the *generalit* of thoſe which are made in *reſtraint* of trade, if, after having lain *dead* letter for 170 years, it ſhall *now*, for the *firſt* time, operat in ſo extenſive and *extraordinary* a manner.

That no cuſtoms were *confirmed* by the act but what *exiſted before*.

On the other ſide, if *mercator extraneus* means alien, what is th meaning of the other words, *qui ſit extra gildam*.

There is no other ſenſe, I apprehend, of the word *extraneus* tha as more generally expreſſed in the charter of the city of *London*: Strangers or aliens to thoſe of the city.

That the court would not conſider the propriety of the charte or the particular wiſdom of the legiſlature; but what the charte meant to grant, and what the legiſlature intended to confirm.

Lord *Mansfield* ſaid, he ſhould be glad to have a full copy of th charter.

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* Verba ſemper accipienda in mitiori ſenſu, ut res magis valeat quam perea

Nulla inhoneſta aut illegitima præſumuntur.

Rex præſumitur omnes leges regni ſui noſſe et habere in ſcrinio pectoris ſui.

To prove *extraneus* here, means a ſtranger *inmate*, he obſerved it had been ſaid, that *extraneus* was a word that requires words of explication; and here there are ſuch words.

That he would not put the parties to an argument, as it did not turn on argument, but on the conſtruction of the charter.

The *uſage* is very ſtrong in this caſe, as exiſting ever ſince the ſtatute: And I can't help obſerving, that it's granted, "that they "have a *gild*, *&c.* as heretofore uſed." The preamble ſeems to refer to the uſage precedent.

Mr. Juſtice *Aſton* ſeemed to think, from the uninterrupted uſage, that perhaps it might be preſumed there was a bye-law, by which the Mayor and Burgeſſes had declared their good will and pleaſure that a foreigner might trade.

Afterwards, in the ſame term, 23 *Nov. Friday*, Lord *Mansfield* delivered the opinion of the court, to the effect as follows:

This is an action of treſpaſs, which the corporation of *Berwick* have thought fit to bring againſt defendant, *for ſelling goods in a public ſhop*, by *Retail*, at *Berwick.*

They ground upon the charter, that no *Stranger* in *Berwick* ſhall ſell by *Retail.*

The *Facts material* to be ſtated, and they are *very material* in ſuch a caſe, are theſe:

That the defendant, about *twelve* years ago, came to ſettle in *Berwick*, and exerciſed, without proſecution, or any reprehenſion, the trade of ſelling *Stockings*, *&c.* by *Retail at Berwick*; that he had *continued* ſo doing *ever ſince*, and that the *cuſtom* hath been ſo for *All Inhabitants.*

The *Charter* and *Act* of *Parliament* is *referred* to.

The *Queſtion is*, *Whether the Inhabitants* of *Berwick* have *Miſtaken* their *Charter ever ſince*, and this is a *new Diſcovery*, or *whether* the *Right Conſtruction has* been *put* upon it.

The *Reſtraint* is *ſo Pernicious* to *Public Policy*, that the *King* is *reſtrained* by *ſeveral ancient Acts* of *Parliament* from *granting* ſuch *Privileges*.

This is a *Charter granted* by *James* the *Firſt*. From *Edwar* the *Third, downwards,* this *Town* had *Many Privileges.*

There had been a *Doubt,* whether *Berwick belonged* to *Englan* or *Scotland*. On the *Union* of the *Two Kingdoms* this *Charter* wa *made.*

A *Bye-Law* was *made* for the *Regulation* of the *Burgeſſes,* and alſo for *Inhabitants* within the *borough*. There is a *clauſe* which obliges the *Burgeſſes* to be *reſident within* the *borough, comorantes* e *reſidentes.* The *cuſtom,* indeed, has *ſince prevailed otherwiſe.*

The *Burgeſſes* alſo are made liable to payment of *Scot* and *Lot.*

The *Latin* is ſomewhat *worſe,* I think, in this *Charter,* than i *that* of *Edward* the *Third:* Worſe, indeed, I think *never* exiſted The *more* a man *underſtands Latin,* the *leſs* he will be *able* to underſtand this.

The clauſe ſuppoſes, that *Every* man of the *Community, inhabiting* and *reſident,* and *liable* to *bear* the *Burthens,* (which were ver *great* in a *Frontier town)* may *Trade, buy* and *ſell Freely.*[*]

There ſeem to be *two* objects; *one* to *confirm* their *Privileges,* th *other* to *grant* them *new.*

The firſt *Clauſe* is to give them a *Gild,* in ſuch *manner* and for as they have *Uſed* or *ought.* *Ita quod nullus mercator extraneus* qu *non ſit de gildâ illâ faciat aliquam* merchandizam *niſi de* Groſſo infr Burgum *prædictam.*

Now in the *tranſlation,* as they tranſlate it, it ſtands thus: "Mak
" any merchandize, by buying or ſelling within the precincts, &c.
I don't know where any *Latin* can be found, that *facere merchand zam* ſhould mean buying and ſelling. It is *mere balderdaſh:* W muſt find out the meaning—he means to grant them *farther privi leges.* "*Volumus atque jubemus et per præſentes concedimus quod qu*
"*cunque mercatores Petierint Burgum prædictam cum mercatura Si*
"*Extranei Sive Alii qui ſint in Pace Noſtra de Quocunque Loco.*"
Proviſion follows, that they may be at *Liberty, eundo redeundo, &* And then farther, ſpeaking of the *Foreign* traders, *quod non occ ſionentur propter Mis-telling in loquelis ſuis: Et quod Nullus Mercat qui ſit Extraneus et Non de Gilda mercaturæ prædictæ aliquod Merc*

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[*] Qui ſentit onus ſentire debet et commodum.

moniti

mium faciat, niſi de Groſſo. That is, if a merchant living *Out* of
e town comes, he ſhall *Sell only* in *Groſs*, and not in *Retail*.

It is *implied*, *mercator Extraneus* may be *de Gilda*; if he *Is Not*,
n for the *Benefit* of the *Inhabitants* of the *Town* he is *Reſtrained*.

This *ſeems* to be the *Meaning* of the *Words* of the *Charter*. If
ey had been *much leſs ſtrong* (though I am ſo far from thinking it
ubtful, that I think this is *much* the *better* conſtruction) in ſo *diſ-*
vantageous a caſe, I ſhould make *no difficulty* of conſtruing it thus,
ven were it as clear as the Sun, after a *Conſtant Uſage* of an *Hun-*
ed and *Seventy* years, *We* think it *Ought* to be *Underſtood*, that the
urgeſſes had *entered* into an *Agreement* to *Renounce* this *Privilege*.
or *this* is not a part of their *Conſtitution* which they *Cannot* alter;
d *then*, on the *Maxim*, *Quilibet poteſt renuntiari juri pro ſe intro-*
ucto, *We* ſhould have been *Determined* by the *Uſage* of ſuch *Anti-*
uity.

Held that long and conſtant uſage would be a ground of preſumption againſt poſitive words of a bye-law, or very ſtrong ones of a charter, eſpecially if the charter was in reſtraint of trade. Maxim.

RETURN the POSTEA for the DEFENDANT.

Goodright *againſt* Gregory.

Ejectment.

ON a *Special Caſe*, *reſerved* from the *Aſſizes* of *Devon*, in eject-
ment, the caſe ſtates, that *Gregory*, being *Seiſed* of a *Tene-*
nent, agreed to diſpoſe of it to one *Stancombe*. This was done by
ſcrivener, in an *informal* manner, by *Indorſement* under *Seal*. It
ppears, that the *Indorſement* was not *Stamped*, and no *Form* of *De-*
very. This action is brought againſt the *Daughter* of the vendor
y a *Voluntary Conveyance*.

Mr. *Buller*—I apprehend the only queſtion is, whether this *In-*
dorſement be a *Deed*; if it were, the *conveyance* is *clearly void* by the
ct. The *Definition* of a *Deed* is, "a *Writing under Seal*;" which
his is ſtated to be.

If any thing is wanted, it is a *delivery*. I apprehend this *is* a
Delivery in *Fact*: And *no Words* are *required*, which, perhaps, *diſ-*
tinguiſhes a *Deed* from *Livery* of *Lands*.

Coke, c. 5, ſ. 5. ſays, *Tradition* is only neceſſary; otherwiſe a
mute man could *not* deliver a deed. Vide *Co. Litt. c.* 7.

On the other ſide, That this writing was *not intended*, nor is to
be *conſidered* as a *deed*. Every writing under *ſeal* is *not* a *deed*; for

then a will would be a deed if it were only *ſealed*; a *letter*, under *ſeal*, would be a *deed*.

If it had been meant to be *delivered* as a *deed*, it would have been *delivered After atteſtation*; inſtead of which, it's *delivered Before*.

No Words are uſed. It's delivered *back* by the *Witneſs* to *Gregory*, and by him to the *Purchaſor*. Though *Words* are not *Neceſſary*, *perhaps*, yet *ſomething is*, to ſhew the *intent*.

1 *Leon*. 140. Debt on obligation; plea, *non eſt factum*. The jury found the *ſpecial* matter, *videlicet*, that the defendant ſubſcribed and ſealed the ſaid obligation, and *caſt* it upon a *table*, and defendant took it up. And the court was of opinion, that upon the matter, the jury had found *againſt* the plaintiff; and that it was not like the caſe where words were ſpoken, as ſaying, "this will ſerve;" for then, by ſpeaking of the words, the *will* of the obligor appeareth, and that is his deed.

Cro. Eliz. 147, there is the ſame caſe, and the ſame diſtinction.

Peck, on demiſe of *Philips*—leſſee, in a ſhort memorandum aſſigned his tenement to another; aſſignee re-aſſigned. His Lordſhip was here of opinion, in this court, that it was a *ſufficient* aſſignment *Without Stamps*. The *want* of *ſtamps* does not *avoid* a deed; it only prevents it's being produced in evidence, and you may only have it ſtamped, and pay the penalties, and *then* it is a deed.

Lord *Mansfield*—It's *given* in his *Preſence*, and *He receives* the *Money*: It is *Clearly* a *Deed between* the *Parties*; and muſt be ſo therefore, as with reſpect to the *Stamp Act*.

Mr. Juſtice *Aſton*—As to the circumſtance of *atteſtation*, though the *ſolemn form* is, "*ſealed and delivered before* us," an *inaccuracy* in that ſhall not *overſet Every thing*. Caſes of *Wills* ſtand very numerous to that effect.

I do not ſee that it was *neceſſary* to conſider it as a *deed*. If a man can *honeſtly* avoid the expence of the ſtamps, I don't ſee why he ſhould not: The *Parties* call it a *Memorandum*.

Lord *Mansfield*—*Delivery* only would *not* make it a *deed*; for a *memorandum* may be delivered.

Aſſignment dated 1768. *Stancombe*, the original vendee, aſſigned it then; but no poſſeſſion went with the aſſignment.

Poſtea muſt be returned for the *Defendant*, they may get it ſtamped and bring a new ejectment.

Debt *and* Bankruptcy.

YOU cannot proſecute notes of hand or bills of exchange by action of debt.

An action of aſſumpſit, which is a demand founded on implied contract, is ſufficient to make a man a debtor within the bankrupt laws.

A. delivers to *B*. who afterwards became a bankrupt, a quantity of ſaltpetre to be refined. No *demand* is made till after the bankruptcy.

Quære, Whether this was a debt within the meaning of the bankrupt laws?

Per Curiam held not: becauſe no debt accrued before the bankruptcy.

Perhaps the ſtatutes concerning bankruptcy do *much more Miſchief* than *Good*: but *we muſt*, while they continue (which perhaps will be for ever) decide according to the *Law* *. But *this* caſe is *very particular*. A Man *depoſits* his own ſaltpetre to be *refined* by a *refiner*, and be returned *within a reaſonable time*. At the *time* of iſſuing the commiſſion, and *long after*, this ſaltpetre was ſtill in ſpecie. The Plaintiff had *waived* the delay and *indulged* him with time. He could not come for the *value*; for the *property* ſtill remained in him. He might have had *trover*; all which could have been recovered was the property itſelf, and the uncertain damages on a verdict.

Bill.

THE act obliges action upon attorney's bill *not* to be brought till a month after the bill delivered; in order that if the parties chooſe to proceed in a ſummary way they may, by referring the bill to be taxed.

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* Eſt hoc *per quam durum*: ſed *Ita Lex Scripta*.
Eſt boni judicis cogitare tantum ſibi *permiſſum* quantum ſit *commiſſum ac creditum*.

Rogues.

13 *Geo.* 1. *c.* 23. *ſ.* 8.

GATHERERS of ends of yarn convicted by one or mor witneſſes, before one or more juſtices, to be deemed and take incorrigible rogues, and puniſhed according to the *ſtat.* 12 *Ann.*

Walker *againſt* Chapman.

ON a motion for a new trial, his Lordſhip read his *Report* This was an action for *money had and received.*

Mrs. *Hopkins* was called, who ſaid the defendant *Chapman* ha been page to the king, and engaged in her preſence, that if th plaintiff *Walker* would pay 50 *l.* to *her*, he *Chapman* would get th Plaintiff a *place* in the *cuſtoms*. That ſhe was preſent when *Walke* interrogated the defendant, whether he would procure the place and that *Chapman* ſaid he would; or ſtand for the *payment* of th money: and that it was the ſame, whether paid to the witne Mrs. *Hopkins* or himſelf.

On the part of the defendant, the witneſſes ſpoke *very ill* of th character of the witneſſes againſt the defendant; and one or tw witneſſes ſpoke of the good character of the defendant.

Maxim.

Beſides, it was contended that the action would not lie, from th *nature* of the caſe, the plaintiff being *party* to the iniquitous co tract: and in *pari delicto potior eſt conditio defendentis*, the law wi *not ſuffer* a party to draw *juſtice* from a foul fountain.

On the opening of the caſe, the exception to the competenc gave a ſuſpicion of the merits: but on being aſked whether h would *ſtand* the trial or *pay* the money, (as the conſequence of th matter's coming out clearly ſo flagrant as ſtated, would not *end* wit payment, but as he was in ſuch a relation to the court, on his ſu fering his name ſo to be tampered with, to give hopes of plac representation would be made to his Majeſty, and the conſequence were eaſy to be foreſeen) Mr. *Chapman* declared he *would* ſtand th *trial*, let the *event* be what it *would*.

The whole tranſaction is ſtated to have paſſed when *none* wer preſent but Mr. *Chapman* the *defendant*, *this witneſs*, and the *plaintiff*

The *Jury* found for the *Plaintiff*.

After the verdict on this motion, the *Court* would not *ſuffe* Mrs *Hopkins*'s *character* to be gone into, as the jury had *believe* her.

A letter from an attorney was produced, laying as a ground for a ew trial the *Claim* in diſpute *neceſſaries* procured from Mrs. *Hopkins* nd *loſs* of *time*, at a ſum between 40 *l.* and 50 *l.* This letter was ſent o Mr. *Chapman*, and it concludes by ſaying, that if Mr. *Chapman* *id not get her the place*, (which he had ſo often *promiſed* her in he cuſtoms) Mr. *Walker* would bring an *Action* or apply by *Petition* to *her Majeſty*.

Chapman's affidavit was read, importing that Mrs. *Hopkins*, the only witneſs againſt him, was very indigent, and had been ſupplied y the ſervants of the court with victuals, goods, and money. And hat *She*, without the *conſent* or *knowledge* of the *defendant* introduced the plaintiff to him, who ſaid, "Sir, I am told you can "do me a ſervice, and get me a place by ſpeaking to Lord *North*; "I have ſerved with alderman *Kennet*," or ſomething to that effect. That he, the defendant, ſaid, "he was not ſo *great a man* "as to *preſume* to *ſpeak* to Lord *North*; that he had *no* intereſt to "procure *any* place; if Mr. alderman *Kennet had*, he would give "what advice and *aſſiſtance* was in his power, but could *promiſe* "*nothing* for himſelf." That *afterwards Walker offered* him ſomething; which he *immediately refuſed*, and *ſhut* the *door* on him; hat after this the letter *before mentioned*, *threatning* him with an *Action*, was *delivered* to him; and on his *abſolute refuſal* to *pay* a *farthing*, another perſon came, who ſaid he was *no lawyer*, but was *deſirous* Mr. *Chapman* ſhould *pay* a *little* money to *get rid of the affair*. *Chapman* ſaid, *he would have nothing to ſay to him*.

Chapman farther ſwears, that *Walker never* was *deſired* by him to lay out any money on his account, or advance any money, or procure any neceſſaries, or the like, for Mrs. *Hopkins* as ſtated.

Walker ſwears to Mrs. *Hopkins* having treated with him, and aſſuring him, that by her intereſt with Mr. *Chapman*, ſhe could get him a place; that they agreed on a ſum; but that he *Walker* required to *ſee Chapman firſt*. That accordingly Mrs. *Hopkins* promiſed to *introduce* him; that ſhe *did* accordingly; that he *told* *Chapman* of the *converſation* between him and Mrs. *Hopkins*; and that *Chapman* ſaid, if he *Walker* would pay the money to Mrs. *Hopkins*, he the defendant *Chapman* would *engage* to get him the place, and deſired him to pay to Mrs. *Hopkins any* ſum not ſhort of the ſum of 70 *l.* agreed on for the place, and that he meant it as a preſent to Mrs. *Hopkins*, on account of the friendſhip he had for her; that he might depend on the place, or he would ſtand *bound* for the money; that *Chapman* ſaid it might be neceſſary to enquire into the *character* of him the deponent *Walker*, on which he the ſaid deponent ſaid he had ſerved Mr. alderman *Kennet* for ſix years, and that *Chapman* might have a character from him; that he hoped *Chapman* did not mean to deceive him, for he was a poor man, and had a large family; that *Chapman*, *again*, made t moſt *poſitive aſſurances*.

That theſe aſſurances were repeated; that on the faith of the he advanced 50*l.* by inſtalment to Mrs. *Hopkins*, and inform *Chapman* thereof, who ſaid he had done very right; again aſſuri him of the place.

That *Chapman* having put him off ſeveral times, he at laſt foun means to come at the ſpeech of him—that then *Chapman* ſaid h meant only a joke, and hoped he had got rid of the woman; an that he ſhould not pay the money; and that if *Walker* came trouble him any more, he ſhould get him committed. He deni that *Chapman* had ever ſaid he was not ſo great a man as to preſum to ſpeak to Lord *North*, and that he could only promiſe his a vice.

The counſel for the defendant objected, that though *Walker* a ſwers *minutely* every part of *Chapman*'s evidence, (even to the mo *immaterial* circumſtances) *except only* the *Letter* of the Attorne he does *not anſwer that*, which muſt be taken therefore as *admitte* It imports a very different ground, namely, *neceſſaries*, *lodging*, &c at the *Requeſt* of the *Defendant provided* for Mrs. *Hopkins*; th therefore great ſuſpicion of perjury preſſes upon the plaintiff and h witneſs. That Mr. *Walker* could not be ſuppoſed ſo ignorant as t imagine that *Chapman* ſhould have the immediate diſpoſal of plac in the cuſtoms.

That as to the objection on the *Point* of law, Mr. *Walker*'s guil admitting all he ſtates to be true, puts him out of a ſtate of enti tling himſelf to any relief, he having contracted for a *Bribe*, as t which his *Want* of *Succeſs* makes *no Difference*, nor was *ever take* to make *any*.

That this *Point* of *Law* however was not meant to have bee *relied* upon on the opening of the trial, and was immediately withdrawn on his Lordſhip's intimation. Nor did they now mean to rel on it, but truſted the perjury of the witneſs would appear ſufficiently; and the incredibility in the thing itſelf, that either *Chapman* ſhould undertake it, or *Walker* imagine that he could.

Lord *Mansfield*—As to the objection in point of law, it is o ſome *importance* to be *generally* ſettled, and therefore I ſaved thi point.

Action for money had and received—contended that the defendant ſeduced him to give money on credit of getting him a plac in the cuſtoms. The money paid—and now taking it thus for th

ſak

ake of the point in queſtion, that the money was paid in conſider- tion of this contract, yes ſays the defendant, but the contract is legal, and therefore I retain your money. And Mr. *Wallace* ſays ery properly the plaintiff comes to be relieved from this illegal ontract; and there is a great difference where a party comes to verturn an illegal contract, and to be relieved againſt it, he ſhall ot be relieved if he comes to take the benefit of an illegal contract; here he never ſhall be relieved, becauſe to relieve him, the court nuſt affirm the contract.

Not only in prohibited contracts, but moral offences, which ould ſubvert the contract, the law will admit of this relief. The law for political reaſons prohibits a bankrupt from giving any oney to a creditor to obtain a certificate; yet the bankrupt on pplication ſhall have the money refunded.

Vide Eq. Ca. Abr. 86.

So in the caſe of uſury, when they don't come for the penalty, ut to have the money refunded after payment of principal and tereſt. There was ſomething which ſeems to have fallen rather aſtily upon ſuch a queſtion in *Tomkins* and *Barnet*, * but the later uthorities are otherwiſe, as in the caſe of *Daſhwood*.

The caſe of *Law* and *Law* is a caſe almoſt in point; 'twas on a ond given to a man as a ſecurity that the obligor would uſe his tereſt with a commiſſioner of the cuſtoms to get him a place in he cuſtoms, (for had the party contracting been a commiſſioner imſelf, he would have been within the *ſtat.* 5 & 6 *Ed.* 6.

As to the bond itſelf, I know not whether Lord *Talbot* had any oubt, but he ſtates thus:

Lord *Talbot*—The counſel on both ſides ſay the bond is good in w; therefore I ſhall determine upon the merits.

(Why they could not ſay otherwiſe, without deſtroying their wn caſe, the objection was on the face of the condition.)

Now, if a condition is void in a court of equity, it will be void law, as in the caſe of *Perkin*, bond of ſubmiſſion to proſtitution ecreed void as *contra bonos mores*—ſo in the caſe of *Low* and *eere.*—Bond, the condition of which was, the obligor ſhould not arry any but the obligee, it was held that this was void and de- royed the bond, becauſe the obligee was not bound to marry him, nd therefore againſt public policy, he might be kept in a ſtate of elibacy.—In all theſe caſes, a court of equity will relieve a perſon ho comes to diſallow the contract, and there is no difference be- ween a court of law and equity as to ſuch relief, even when the condition does not appear upon the bond. (I think in all theſe caſe the court of equity adopts that principle which tends moſt to prevent the miſchief. It has been ſolemnly determined in the Common Pleas, its the ſame if proved, vide the caſe of *Collins*. An the reaſon he gives is almoſt as great as the authority.)

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* Namely that money paid by miſtake might be recovered on indebitatus aſſumpſit, but not money on an illegal conſideration, vide Salk. 22.

There is alſo a caſe of *Shipley* and *Woodhouſe* ſimilar to that o *Perkins*.

As to the letter in this caſe now before the court, it is very extraordinary it ſhould not have occurred at the time of the trial; i appears now, however. And it is very extraordinary on the othe hand that the whole ſtreſs of the evidence ſhould lie on a witneſ who can only be denied by the plaintiff or defendant. This woman is impeached in the only manner in which ſhe can be impeached; by her character. However, as the jury credited her, w ſhould not go into that.

But let us examine farther how ſhe ſtates the payment of th money; ſhe ſtates he paid her 50 *l.* any one would have ſuppoſed this ſum was paid at once. No: it appears on the plaintiff's evidence he paid it by inſtalments: farther, it is on a different contract; there ſhe makes it a contract for 50*l.* for a place worth 70*l.* the plaintiff makes the contract itſelf 70*l.*

Then as to the time of the letter, which is the moſt importan circumſtance of all, for when Mr. *Wallace* had got half through I was pretty clear there could be no new trial. But the time o that letter deſerves the utmoſt attention. I ſee what the letter conveys, and which may be the truth of the caſe—lending money to Mrs. *Hopkins*. He lent very probably on credit of her having intereſt with the defendant. The ſum is an unliquidated ſum; 'tis not alledged as upon contract, but ſhe boards and lives with him.

An unliquidated ſum, inſtead of a ſpecific ſum: this gives th *ſtrongeſt* ground for apprehenſions, and furniſhes *great* cauſe for a new trial.

But the defendant having neglected to produce this letter on the trial, the new trial ſhould be *without coſts*.

Mr. Juſtice *Aſton*—The caſe of *Tomkins* and *Barnet* is ſo looſely ſtated, that the reporters ſeem not to know what to make of it; one ſtates it to have been at *niſi prius*, the other in the King's Bench, as before a full court. And I cannot therefore give much credit to a note ſo looſely ſtated of a *dictum*, which is there that money cannot be recovered againſt a ſolicitor, ſo as to oblige him to refund, where the money was given for bribing.

I queſtion whether *Bribery* in *Elections*, the *growing Vice* of this *Kingdom*, would not be more likely to be reduced if it were known to be otherwiſe, and that a *Bribor could* recover againſt the *Bribee*.

However, I give *no* opinion on that—nor what would have been the caſe if Mr. *Chapman* had procured the place, and *Walker* had brought his action.

But here I take my ground upon the fraud.

Farther, the difference between an unliquidated and a ſpecific ſum, between a ſum in groſs and a ſum ariſing on money lent, neceſſaries furniſhed and other articles.

The non-anſwer to the letter now produced, joined to the doubtfulneſs of the queſtion, makes ground *abundant* for a new trial.

The not anſwering this is, I think, an *abandonment* of the cauſe.

But the new trial, I think, ought to be on payment of coſts.

Mr. Juſtice *Aſhhurſt*—The caſe of *Law* and *Law* cited by his Lordſhip is a caſe in *Point*; and if a *Court* of *Equity* would relieve there upon the bond, a *Court* of *Law* will *relieve here*—this to the *point* of *Law* grounded on the fraud.

Then as to a new trial on the *evidence* of *Fact*: if the defendant's *negligence* makes it neceſſary, as it *does certainly*, that coſts be added, the *importance* of the caſe equally makes it requiſite a new trial be granted.

Lord *Mansfield*—The caſe of *Tomkins* aroſe from the money not having been paid to the man *bribed*; but its paid to a ſolicitor to his order. There certainly he ſhall not recover againſt the ſolicitor, but ſhall take the loſs, having truſted the money into his hands for ſuch a purpoſe.

Certiorari.

RETURN to a *Certiorari*—upon which the juſtices to whom the certiorari iſſued, return order upon the matter in queſtion.

Motion that the juſtices may return *examinations* before them.

The *Court* would *not* grant this. And Mr. Juſtice *Aſton* ſai that if a conviction is returned, the court never order them upo information to return examinations. *Except* in the caſe of *Coroner* where the *Court*, as *ſupreme Coroner* of the *Kingdom*, will *order* *Return* of the *Depoſitions* as the *Ground* on which they *go*.

If they *return falſely* or *inſufficiently* that an *Action* may lie another thing; but *We never oblige* them to *Return* to the *Certi* *rari Evidence before* them, ſuch as *Affidavits*, or the *like*.

Outlawry.

MOTION to reverſe an outlawry in the uſual way.

Refuſed—the *Record* not being in *Court*.

Allowance under the Inſolvent Act.

MOTION to reduce allowance as being diſcretionary in th court, in the caſe of a priſoner under the inſolvent act. The court would not do it; and ſaid they never allowed le than the *full* ſum of 2*s*. 4*d*. a week.

Inſolvent Act.

WHETHER a perſon who held a poſt in the horſe guards could be diſcharged under the inſolvent act, ſtil retaining that poſt for his own benefit, was queſtioned.

It was urged, that it was a poſt which he could not *aſſign*, nei ther could he ſell it, unleſs by permiſſion, and that it was matte of *indulgence* whether he might ſell or no.

Mr. Juſtice *Aſton abſente Capitali Juſticiario*—My Lord is no here. I ſpoke to him of it at *Serjeant's-Hall*, and mentioned tha it appeared very hard that a perſon poſſeſſed of a valuable intereſt though not *aſſignable*, ſhould hold *againſt* his creditors, and take th benefit of the inſolvent act. My Lord Chief Baron *Smythe* wa preſent, and mentioned a caſe of *Richardſon* a bankrupt, where though the intereſt was not aſſignable, the court would not per- mi mit the bankrupt to have his *certificate* till he had *ſold* it. And Lord *Manſfield* ſaid he *remembered* the caſe.

If he had applied to his officer, and the officer would not have conſented, then it would have been different.

Serjeant in Militia.

IT ſeems the office of ſerjeant in the militia is not held an intereſt within the inſolvent act, not being vendible.

Time of Payment of the Groats under the Inſolvent Debtors Act.

NOTICE given to pay on *Saturday* objected, becauſe made payable by the act on every *Monday*.

The *Court* ſaid *Monday* was only by way of *inſtance*, and any other day would do.

After judgment in the caſe of *St. John* and *Errington*, * upon Sir *Brian Broughton*'s will, the party who had made the eſſay of what opinion the King's Bench entertained on his ſide, finding it adverſe, the matter appeared in form.

* Vide ſupra, p. 113.

This caſe came before the Common Pleas, and was argued pretty largely, rather upon conſtruction, as to the effect which the words muſt legally carry, than upon the intent.

St. John *againſt* The Biſhop of Wincheſter.

On a *Quare impedit*. 29 *Nov.* 1773. *Mich. Term.*

I HAD been preſent at part of the arguments in the Common Pleas, but had taken no note as far as I find, and not expecting it would come on when it did for judgment, I was not in that court till a little after eleven. However, though the Lord Chief Juſtice had proceeded a little way, I was able to collect the greateſt part of the judgment, which was nearly to this effect:

The title of all fees is *prima facie* in the heir, where it originally reſides, and muſt not be taken out of him, unleſs by *expreſs* words, or *neceſſary* implication.

Vaughan 263.

Here it was very probable the teſtator did not mean to divide an of the lands immemorially occupied with the farm.

Vide 259 various caſes where he ſhall not be diſpoſſeſſed bu by *neceſſary* implication.

Two inſtances, I think, there are, which may be *qualificatio* of this rule.

One where the deſcription is *partitive*, and from its *ſeveral* members the *entire* deſcriptions of the *eſtate intended* may be *collected* rejecting as *ſurpluſage* what is *inſignificant* or *ſuperfluous*, or doe *not anſwer* the *general* and *entire deſcription* itſelf, ſo taken from the ſeveral parts, but is *inconſiſtent* with it and impoſſible to be ſatisfied.

The other, where the deſcription conſiſts of two parts; one o which is a *complete* deſcription, with which the thing *correſponds* and the other *not belongs* to it *at all*.

The teſtator here had an advowſon in *poſſeſſion*, he had eſtate *contracted* for. Is the advowſon in queſtion *bought* or *nct* bought Wills muſt be interpreted according to the *common ſenſe* of words in the *general* and *vulgar* uſe of them among men. In *commo language*, if a man has an eſtate in *poſſeſſion*, and is aſked have yo *contracted* for this eſtate? No: I have bought it long ago. If aske have you *bought* ſuch an eſtate? No: I have *contracted* for it Words are to be taken in wills according to the *common* and *obviou* acceptation. There is no drawing a *line* between an eſtate bough *before* the will *three months* or *twenty years*. And farther, it doe not appear there was any *contract independent* of the *conveyance*.

Next, this deſcription is *not* diſtributive in ſuch a manner as tha part will *fully* anſwer the circumſtances of the *eſtate*, and anothe part *not* apply to it; for *no* part applies to it; therefore *none* ca be retained as *completely* or *at all deſcriptive*, and the reſt *rejecte* as *ſurpluſage*.

The words "*contracted and agreed*" will not expreſs an *actua purchaſe*; there muſt be words interpolated, ſuch as the eſtate which I have before *purchaſed*, and alſo thoſe which I have *contracted* and *agreed* for.

But there is another ground on which, if we agree, the judgment I pronounce will be *principally* founded. It is the *alternativ* deviſe, or in *lieu thereof*, what does that refer to, the *entire* deſcription *before*? As to the eſtate contracted for in *Hants*, there wa no occaſion to give an *alternative* of what he could deviſe; bu of an eſtate which he *wiſhed*, but could *not legally*, in *lieu* of that, the money to ariſe from the ſale in *Lincoln*, which will *exactly anſwer* to this one *advowſon*. This eſtate *deſcends* to the *heir at law*: What the remedy at law will be, is another conſideration, and not before the court. The heir at law, however, may be *compelled* in a court of *equity*, to *ſell* the eſtate, and to *receive* the *money*. Next, Lady *Braughton Delves* is to lay out the money, which will *buy* the eſtate in *Hampſhire*. If the *Lincoln* eſtate ſells for *more*, the heir at law will have the *ſurpluſage*; if for *leſs*, it will be to be ſupplied out of the *aſſets*.

Now where there is a *thing given*, and an *equivalent* inſtead of it, the *equivalent* explains the *thing*. On a computation, the 27,000 *l.* given as an *equivalent*, will exactly anſwer the eſtates contracted for in *Hants*.

I have looked into the caſe in the court of King's Bench, which is *materially* different: For there is no mention of the circumſtance which concerns the *Lincolnſhire* eſtate. Without any judgment, therefore, or opinion upon *that*, we are of *opinion*, the advowſon *purchaſed* does *not* paſs to Lady *Braughton Delves*. As to the word *advowſons*, in the plural number, it appears, that the teſtator uſed the ſame word where he had no *advowſon* to paſs, but only a preſentation to a perpetual curacy; which he might indeed take for an advowſon, but to which the ſame objection would lie, as to the uſe of the *plural* number.

Error from the Common Pleas.

In the King's Bench, *Trinity* term, 4 *June* 1774.

Mr. *Mansfield*—My Lord, this comes before your Lordſhip by error out of the Common Pleas. The plaintiff claims under the widow of teſtator, as deviſee; the defendant under a conveyance from Sir *Brian Braughton*, the heir at law, on a ſpecial verdict, upon which the judgment in the Common Pleas was formed. The jury found as follows: The jury find in 13 *June* 1763, articles of agreement between Sir *Brian Braughton*, the teſtator, and *A. B.*

Other articles in the ſame year with Mr. *Pitt*, to convey lands.

In *February* 1764, conveyance of the advowſon to Sir *Brian Braughton*.

Farther ſtated, that Sir *Brian*, having made this purchaſe, and having eſtates in *Suffolk*, *Lincoln*, and *Salop*, and a ſmall eſtate in *Cheſhire*, made his will in 1764. The material part is, "I give

“ *all* the *manor*, *meſſuages*, *advowſons*, *farms*, tenements, heredit
“ ments whatever, in the county of *Hants*, for the purchaſe where
“ of I have already contracted and agreed, to my dearly belove
“ wife; or, in *lieu* thereof, the money ariſing from the eſtates i
“ *Lincoln*.”

An eſtate in *Stamford* he gives to his heirs in tail; remainder ov
to perſons named in the will.

Like deviſe of advowſons in *Cheſhire*.

Verdict ſtates, that he had no advowſon in *Cheſhire*, or *Stamfor*
but only a nomination to a perpetual curacy for the time being.

Queſtion, Whether as to the advowſon *purchaſed before* the ma
king of the will, Lady *Braughton* is entitled? This will appear up
on the *intent*, and circumſtances.

This does not depend either upon *caſes* or *rigid* rules of law
but on the conſtruction of the *mere* will.

The ſole diſpute is not on the quantity of the eſtate; but on th
premiſſes, whether this *advowſon did* paſs.

The verdict ſtates a contract in 1763.

In *October* 1763, contract for the purchaſe, to be completed o
the thirteenth of *May* 1764; *before* which he purchaſed the *Ham*
ſhire advowſon.

He appears then to have intended to give his property in *Han*
to Lady *Braughton*, his *Stamford* and *Cheſhire* eſtates to his heir.

He has given in the moſt comprehenſive manner poſſible, an
uſed the word *advowſons* in the *plural* number. It is contended o
the part of the heir at law, that, notwithſtanding theſe *gener*
words, they are ſo *limited* and *reſtrained* by the words, “ for th
“ purchaſe whereof I have *already contracted and agreed*,” th
their effect ſhall fail of carrying ſo extenſively as they otherwiſe mi
have *done*. Yet, undoubtedly, every purchaſe is a *contract*, an
more; and ſo every man would underſtand theſe words, upon th
common interpretation.

This advowſon had been *recently* purchaſed, and therefore h
might not ſo *ſtrictly* have *attended* to the diſtinction.

What would have been the caſe if he had ſaid *purchaſed*? Th
heir would have ſaid, “ You have only the advowſon of *Motſo*
“ th

“ the reſt were only in *contract*.” The heir would have been told, that in *equity*, it was to be taken that the teſtator, by the *contract*, had made a *good purchaſe*, in the ſenſe of *paſſing it* as *ſuch*; and therefore, *vice verſâ*.

The words are not ſatisfied with this conſtruction, if *only one* ſhould paſs. *Bulſtr.* 176, “ All my moieties in *Kent*” paſſed, the one in *Kent*, and another in *Eſſex*.

Another caſe, in *much earlier* days, *Dyer* 376, a man, who on feoffment had conveyed an houſe, *formerly* the houſe of *R. Cotton*. It turned out, *R. Cotton* never had it, but *James Cotton* had; and this was held ſufficient to paſs the houſe, though upon a *feoffment*.

Burr. Goodright, on demiſe of *Paul*, againſt *Paul*. Queſtion, upon a *will*, “ my farm in *Bovengton*, in the tenure of *Smith*.” Queſtion, upon a woodland *expreſsly excepted* in the leaſe to *Smith*, which *yet* was held to paſs.

Mr. *Dunning*—The queſtion, if there be *any*, is a queſtion of *intention*. I find a difficulty how there *can be* a *doubt* of the *intention*. If he has not uſed the *fitteſt* words to expreſs what I conceive to have been his *intention*, I own, had I been at his elbow, I could *not* have furniſhed him with *better* words. I admit, that the words which ſtand firſt are ſo *general*, as to paſs *all* his eſtate in *Hampſhire*; but the *following* words, I think, have *juſt* the ſame effect as if, having given the *whole* of a thing in the *beginning*, he ſhould *expreſsly* reſtrain that *whole to one half*.

He gives Lady *Braughton* money, to carry the contracts into execution; therefore this was given as an *equivalent*, in caſe any doubt upon title; not in order to *purchaſe* what was *purchaſed already*. I don't know the queſtion can be made clearer than on the words of the will.

But Mr. *Mansfield* ſays, it's a contract and *more*; it's one of thoſe *mores* which does not *comprehend* but *exclude* the *leſs*. It was near the purchaſe; might it not have been much more remote? The purchaſe was made *complete* about four months before the will; can the conſtruction upon *this* will depend upon the *date*? If they had been *purchaſed thirty* years before, would it have made a *difference*? If the purchaſe was preceded by a *contract*, this, it is ſaid, may make a *diſtinction*. I don't know that was the fact; nor is it upon evidence, and probably there was none; nor do I care if there were: For a thing *purchaſed*, preceded by a *contract*, or a *purchaſe* without any *precedent contract*, will make *no* difference in this reſpect. The method to have removed a doubt would have been, not to have ſaid purchaſed *ſimply*, or contracted *ſimply*; but he would have ſaid,

" for which I have *contracted* and agreed, *or purchaſed.*" But eve if the word had been *purchaſed*, a *contract* would be conſidered as *purchaſe*, and *executed* as *ſuch*, by a common application on th other ſide the *Hall:* But I deny that the terms are *convertibl* or that a purchaſe will be implied to paſs by words, which paſs *expreſsly* an eſtate in *contract*.

Not only *words*, but every *letter* of the *will*, muſt have it's effe given, and that at the expence of *expunging whole* ſentences; eſpecially that "for the purchaſe whereof I have contracted and agreed." I will only ſay, the *force* of this I can't conceive, with reſpect to *operative* words, and which can be brought in only to have their *operation*, and not *currente calamo*; whereas, on the other ſide, one ma *eaſily* conceive how the letter *s* might come in by *accident*, or overſight, or of *courſe merely*. I think my friend was not guarded a uſual, upon the whole of the caſe, when he ſaid inaccuracies ar not to be regarded. I will beg the court may uſe them as they always do, reject them: But I think they may reject the letter *s* a coming in as impertinent, rather than whole ſentences in differen parts of the will, evidently material, and which *cannot* come in b accident, or of *courſe*. And there can be no prevention of dying *inteſtate*; which, if it be an evil, he muſt do at all events, as to *ſom* parts.

He uſes this word *advowſons* in the counties of *Cheſhire* and *Stamford*; and I ſhould have thought it thrown in *generally*, among words comprehenſive of every *poſſible* ſpecies of property, if he had not mentioned *tithes*; but at leaſt, it ſhews that he was *miſtaken* i the *one* inſtance, for he had no *advowſon* in theſe counties, though he had a *donative*. Why then are we obliged to ſuppoſe, in the *other* inſtances, that he was more *preciſely* acquainted with the ſtate o his property? Theſe two inſtances cannot be ſaid to be *immaterial* And they were not in the caſe upon which your Lordſhip *decided.*

Mr. *Manſfield*—I find we concur perfectly, that *all* wills muſt b interpreted by his *intent* who made them.

I don't agree that the words, " contracted and agreed," are a effectually *reſtrictive* as if he had ſaid, after words paſſing the *whole*, that he gave only *half*.

Lawyers may underſtand the difference *very clearly* between *contract* and *purchaſe*; and know that the contract, being completed, *ſinks* in the purchaſe: But I was contending for what is the common ſenſe and language of teſtators.

With reſpect to the words which paſs the eſtates in *Stafford* and *Cheſhire*, I ſhould think the argument runs *rather*, that he uſed *general*

eral words in *both* inſtances, meaning *all* the eſtates in thoſe coun- ies ſhould paſs to his brother; as in the *other* to his *widow*. I do ot think it *proper* to make any argument upon the *former* judgment f the court; as knowing that if the caſe were the *ſame*, it would ave *no* effect upon what ſhall be *now determined*. If it was *not* the ame, it will have a *different* conſtruction; if it *were* the *ſame*, *then* nd *now*, yet *ſtill*, if the court thought the judgment *wrong* upon which the queſtion turns, they would have *no* regard to the former ecision. I declare, I can ſee *nothing* that makes a diſtinction. What I rely upon *is*, he meant the eſtates in thoſe counties before amed ſhould paſs to his brother; in the other to his widow.

Lord *Manſfield*—If this caſe came before the court *exactly* in the ame circumſtances as before, the opinion then given would have *no* nfluence upon the *preſent* determination. On the *contrary*, the *au- hority* ſince would *greatly ſhake* that deciſion. An heir does not ake by *intent* of teſtator; but for want of being *excluded*.

The heir *cannot be diſinherited* by *probable conjecture*, or what is called in *Gardiner* and *Sheldon poſſible* implication. I have *ſtruggled* as far as I *could* to be of opinion with the determination *now* before us; and but *yeſterday* I had brought myſelf to be *ſatisfied*: But, on having the caſe *before* me, and finding what the argument was *ſtrongly* grounded on in the judgment, of an *equivalent* given, is a *miſtake*, I am *returned* to my former opinion.

The whole queſtion between us is, whether the word *advowſon had a meaning*; and that meaning underſtood and applied, then the conſequence will follow.

If he had ſaid "the advowſon of *Motſon*, and the advowſon of *Abbot's End*, for which I have already *contracted* and *agreed*," here could not have been a *doubt* upon a *recent* purchaſe. Queſtion, whether the word *advowſons*, in the plural number, is to be *rejected*?

I have no doubt, it *might* have been upon argument both of the ubject matter, and argument upon the *intent*. In family eſtates hey go as *general* words; but in *this* caſe they were *particularly* circumſtanced.

Whether to gratify himſelf, or his wife, he had a mind to make a purchaſe in *Hampſhire*, where he had *no* family eſtate, and ſell in *Lincoln*, for that purpoſe he enters into *contract*; and for the *ſame* he gives directions in his will.

13th *June* 1763, he contracts for lands in *Hampſhire*, to the value of about 13,000 *l.* covenant to be completed 13th of *May* 1764.

13 *October* 1763, he articles for other eſtates, and an advowſon; 7000 *l* paid down on the 25 *March* 1764, till the money was to be paid [14000 *l.* I think, was the ſum, there or thereabouts.]

25 *February* 1764, he *purchaſes* the advowſon. There are then *three* different ſorts of eſtates, which he had to diſpoſe of, *one* upon articles *wholly executory*; *another* upon articles *not wholly ſo*, becauſe a third part of the money had been *paid*; the *third* under *actual recent purchaſe*.

To this *laſt* the drawer of the will muſt have been *privy*, as the interval was between the *third* of *February* and *tenth* of *April*, when the will was made.

The drawer meant to comprehend them *all* in general words. He ſays, therefore, "for the purchaſe whereof I have already contracted and agreed." If he had ſaid only *contracted* and *agreed*, that would have *excluded* the *contract*, where a great part of the *purchaſe*-money had been *paid*. Then he brings in the word *advowſons*, and he takes in *all* he has in *Hampſhire*, with the *utmoſt generality*.

Now ſhall this be ſet aſide, becauſe he has ſaid, "for the purchaſe whereof I have already contracted and agreed?"

What was greatly relied on in the Common Pleas, and led me to think I ſhould find reaſon to agree with that judgment was, that he has given an equivalent.

That he meant only the *mere executory* contracts, becauſe he has given, in *lieu* thereof, the money from the ſale of the *Lincolnſhire* eſtate. Now the equivalent muſt be underſtood *co-extenſive* with the thing for which it is to be an equivalent; and the 27,000*l.* from the ſale of the *Lincoln* eſtates, will *juſt amount* to the purchaſe of the eſtates under contract, *executory* in *Hampſhire*. But, looking into the will and verdict, I find there is *no* ſuch thing. It cannot be an equivalent; for *this*, becauſe 7000 *l.* was already paid. He gives *that*, and ſo much more money as ſhall be neceſſary: Then it is not an equivalent, but is to carry the purchaſe into execution.

What does this mean? He could not but have in view this would be carried into execution *before* his death. The time was elapſed. It is *merely* that he gives her as much more as ſhall be neceſſary to complete the purchaſe of whatever of the eſtates *intended* for her ſhould *happen* to be *unpurchaſed* at his death.

The *whole* then is, whether there are *words* in the will. It is manors, lands, and *advowſons*. Now we muſt reject the word in it's *literal* ſenſe, and ſuppoſe they did not *underſtand* what the word *meant*. No argument ariſes from what relates to the deviſe in the *other* place: For all it proves is, he meant in one inſtance to give the *whole* to his brother, in the other to his *wife*.

Mr. Juſtice *Aſton* expreſſed his opinion upon theſe grounds, amongſt others, that the queſtion was, whether *ſubſequent* words ſhall reſtrain the effect of the *plural* of the word advowſon: That, he thought, the words which followed in this caſe ought *not* to take away the *efficacy* of the former.

That the great ſtreſs of the argument in the Common Pleas laid upon the equivalent, does not apply. Therefore, with his Lordſhip, upon the *manifeſt* words and *intent*, that *both* will paſs.

The other two Judges were of the ſame opinion.

Judgment in Common Pleas REVERSED.

On *Appeal* to the HOUSE of LORDS, the judgment of the King's Bench was AFFIRMED.

Attorney.

HIL. 1768. RULE. It is *ordered*, that the *maſter* be ordered to prepare the proper book, and that every attorney in the cities of *London* and *Weſtminſter*, or within ten miles, ſhall enter their names and place of abode, or ſuch other place within the cities of *London* or *Weſtminſter*, where he may be ſerved with notice. And that ſervice ſhall be good where he was laſt entered. And if any attorney neglect or diſobey to enter, then ſervice at the maſter's office ſhall be deemed good ſervice, except where perſonal ſervice is required.

The alternative in this rule—place of abode, or ſuch place, *&c.* where he may be found, was objected againſt. But Mr. Juſtice *Aſton* explained, that there were many attornies, who had no fixed certain place of reſidence; that therefore, ſuch place where he might be ſerved, though not his actual place of abode, was mentioned. But where name and place of abode is entered, then ſervice at that place is the proper ſervice.

Rule, *Mich.* 10 *G.* 2. Upon all proceſs on the firſt and ſecond day of the term, the declaration muſt be delivered conditionally, on the return day.

Eſſoign Day.

FILING a declaration on the Eſſoign day of the term is not to be a declaration as of the term itſelf.

Right of Soil in an Highway.

ON a queſtion of a right of ſoil in an highway, it was contended, the preſumption was in favour of the freeholders on each ſide, and not of the lord of the manor: Evidence of ownerſhip was offered on behalf of the lord. The judge who tried held it not ſufficient to repel the preſumption. On the motion for a new trial, contended, that the jury ſhould have found upon this evidence: And that all preſumptions of this nature admitted proof to the contrary. Thus taking gravel, *&c.* was a *prima facie* preſumption of the right of the ſoil.

By the 5 *Eliz. c.* 13. *ſ.* 3. ſurveyors of the highways may take *rubbiſh*, or any the *ſmalleſt* broken ſtones of any quarry or quarries within any pariſh where they are ſurveyors, for the repair of the ways within their pariſh or limits, without the controul, licence, or conſent of the owners. Therefore taking ſtones, *&c.* away, does not prove a right of ſoil concluſively, againſt evidence that they took as ſurveyors.

Poſſeſſion is evidence of property: But if poſſeſſor will acknowledge he is in for another, that is evidence, not only againſt himſelf, bu againſt all mankind.

Paſſing over another's ground is, *prima facie*, evidence of a righ of way; but you rebut this if you prove he aſked leave.

A gate croſs a road is a nuſance, unleſs it be an ancient gate, bu not then, though a modern would. And a nuſance ſhall not b preſumed, becauſe that would be preſuming criminality, which th law *never* doth preſume.

As to the preſumption of the ownerſhip of the ſoil of an ancien highway, whether it be in the lord of the manor, or in the owner of the freehold on each ſide.

Brooke, tit. *Chemin. Plac.* 10. *Note*, by all the juſtices, the king hath nothing in the highway but paſſage for himſelf and his ſubjects; but the freehold is in the owner of the ſoil.

Another caſe, that the ſoil and freehold of the highway belongs to the owner of the lands of each ſide, and therefore he ſhall be obliged to cleanſe the ditches.

1 *Roll's Abr.* 392. Generally, the owner of the ſoil on both ſides the way ſhall have the trees growing in the way.

Contended, on the other ſide, that the preſumption in all caſes was, that the lord of the manor was owner of the ſoil. The lords of manors, from time immemorial, were owners of the ſoil. If no other right of ownerſhip has been exerciſed, the right continues where it was.

Brooke, *Chemin. Plac.* 11. *Note*, where a man gives a manor, the donee of the manor hath the freehold and ſoil of the highway, and might have diſtrained, but is prevented by the ſtatute. *Et ex hoc ſequitur*, that the lord of the manor is owner of the ſoil. *Keilway*, 141.

Lord *Mansfield*—My great doubt in this caſe is, whether the jury exerciſed any judgment upon the evidence, repelling the preſumption. As to the preſumption, I think the principle of the more modern authorities is rightly taken, that the preſumption is in favour of the lord of the manor, even though the highway may be more ancient than the grant of the manor. If no body can ſay they have any argument or proof of property in them, then it belonged to the crown, and paſſed with the reſt of the lands.

But if the roads paſſed through the property of others, and are ſo ancient that no body can ſay when they were made, or ſpeak to property, the only queſtion is, where is the firſt preſumption upon that naked, ſtrict, abſtracted caſe.

I think the reaſon of the thing is, when the naked preſumption ſtands ſtripped of evidence, that it is in the owner of the land on each ſide. But this is only ſuch a preſumption as is not like a title. Acts of ownerſhip againſt a title once clearly eſtabliſhed, would not have been ſet up, ſo as to avail againſt the title.

For the ſake of certainty (and it does not matter here how it is determined, if there be a certainty) the preſumption is in favour of the owners on each ſide.

But there is alſo a preſumption in favour of the lord—How do the preſumption ſtand in favour of the lord? There is an under-te nant in one of them, who pays to his immediate aſſignor, who pay over to the lord.

A tenant applies for leave to pull down one of theſe cottages, be cauſe he has not room to turn.

Theſe are *recent* inſtances, and preſume more ancient acts o ownerſhip.

Another agrees to pay five guineas for gathering coals on the ſoi but then thinks it not worth his while.

This is ſtrong evidence. The nature of all evidence is, that con trary evidence, if to be produced, will take off it's weight: B here is no ſuch contrary evidence. I imagine the jury took it as direction for a nonſuit.

Mr. Juſtice *Gould* having ſtated to them that the evidence was n ſtrong enough to repel the preſumption.

On theſe circumſtances, and the ground of it's being a queſtio of right of property, rule granted for a new trial, but on payme of coſts.

Entry.

Doe, on the Demiſe of Davenport, *againſt* Duncana

ON a rent charge, ariſing from coal mines, with clauſe of r entry for arrearages, entry held not neceſſary to maintain action, unleſs to ſave the effect of a fine, in which the ſtatute 4 *H.* 7. made it neceſſary.

Bur. 1895, was cited. Lord *Raymond*, 750. And 14 *G.* 2. *c.* 2 which provides, that in all caſes between landlord and tenant, witho any formal demand and re-entry, the ſheriff ſhall and may deliver po ſeſſion. And it was argued, that this ſtatute was a conſtructive decl ration of parliament, that the caſe in *Salkeld* and Lord *Raymond* is la namely, that wherever you can enter, you muſt; and that you mu gain the poſſeſſion by entry, before you can part with it. And the cou ſel who contended for the neceſſity of the entry ſaid, he could not fi to the contrary any caſe, or any thing, on any general principle of la

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Lord *Mansfield* aſked what was the reaſon of the diſtinction between non-payment of rent and the other caſes.

Mr. *Davenport* took a diſtinction, and ſaid that, on condition broken, the eſtate in this caſe was ſaid to reveſt, which, he apprehended, was an incorrect expreſſion; for that the *original* eſtate continued; but where the grantee had *no* eſtate in the lands, but merely a *naked* power of re-entry, *there* he muſt enter, or have no action.

Mr. *Wallace*—That the re-entry was not one in form, and actual, but an entry in law.

Where an heir ſhould enter, and ſome body enters before him, the old doctrine of abatement ‡ and intruſion is not *now* ſo held, that a counſel upon a circuit would give advice to make an actual entry. What end of juſtice is it to anſwer?

ntruſion is where one enters, or continues in poſſeſſion, after an eſtate for life determined, to the emainder, or reverſion. There is alſo diſſeiſin, which is an unlawful entry, and ouſter of ctual ſeiſin. Uſurpation, where one who has no right to preſent, preſents to a church, and mitted and inſtituted, and continues for ſix months. Diſcontinuance is where he who has not liens, and puts the party injured to a real action. Deforcement, properly, is where he who as recovered againſt the perſon who hath the right; or holds poſſeſſion from him who hath roperty, but never had the poſſeſſion.*

Fines, I own, have a technical reaſon, with reſpect to entry. It appears by *Coke*, that their operation is to diveſt all legal poſſeſſions, and reduce them to a bare right; therefore you muſt enter to reveſt the poſſeſſion.

In caſe of vacant poſſeſſion, the old form was, you muſt enter and ſeal upon the premiſſes; but if there was any perſon to confeſs properly to the ejectment, it was not neceſſary to uſe this form; and the ſtatute ſeemed to have intended only to determine as to vacant poſſeſſions. Or ſuppoſe the meaning to have been otherwiſe, might not he argued the legiſlature, in that inſtance, in a caſe between landlord and tenant, and the parliament, more compoſed of landlords than lawyers, might not they think they were making law, and not advert that it was law before?

Lord *Mansfield* obſerved, this often happened; and that there had been a caſe, where Sir *Eardley Wilmot* cited ſeveral inſtances of it; and that it was particularly likely in this caſe.

Lord *Mansfield*—I was upon the trial, and continue clearly of opinion, that re-entry was not neceſſary, except to avoid a fine, and there it is neceſſary, by the expreſs words of the ſtatute. If ejectments had been known then, in the uſe to which they are now applied, the legiſlature would, probably, have mentioned them.

‡ Abatement is where one enters after the anceſtor, before the heir. prejudice of him that hath his clerk is ad- the full right, has not right, the right of

* Vide Hale's Analyſis, ſ. 43. Co. Lit. and 3d Commentaries

But, to make an entry neceſſary here, would have no other effect than that of obliging to a troubleſome ceremony, to take the chance of it's being omitted, or informally executed, to turn the party round, and avoid a juſt debt.

Ludlam, on the Demiſe of Hunt.

In Ejectment.

ON a caſe reſerved from the *Leiceſter* aſſizes for the opinion of the court.

This was upon the will of *Samuel Ludlam*, in 1738.

His power of making the will turned upon the validity of a will contended to have been made by his father, in 1684.

A queſtion aroſe, whether a copy of this will, from the ſpiritual court of *Leiceſter*, could be admitted, which was the principal point ſubmitted.

And it was argued, that no rule of evidence was more clear and certain than that when a deed or will is to make a title, the deed or will muſt itſelf be produced, and not a copy. And that ever ſince the caſe in *Rolles*, ſo it hath been univerſally held, and that upon many and good reaſons, and in conformity with the ſtatute of frauds.

That though it would be too much to ſay, that on *all* occaſions the evidence of a copy ſhould be refuſed, yet, that there muſt be very ſtrong reaſons to admit of any thing that might any way ſeem to tend to the prejudice of ſo general and uſeful a rule. The copy comes from the ſpiritual court, but the hand and ſeal of that court is not the proper evidence here, to prove the authenticity of a will by a copy.

Poſſeſſion has gone ever ſince as it would have gone without the will.

There is no other evidence of the will but this copy; and, by the nature of the thing, a will is generally capable of other evidence.

But the mark of the *executor* (for he did not write) is pretended to be compared to the mark he uſed to affix to other inſtruments. This was a mark ſet to a bond given to the ſpiritual court for producing the will.

The

There is no ground in authority or reaſon for admitting compari-on of marks.

That it appeared the will was never in poſſeſſion, if it ever ex-ted.

That in favour of the heir at law where circumſtances were oubtful, the court would incline always.

As to another objection, which was, that this being in *Knareſ-rough*, and lands incloſed there by act of parliament, the act f parliament ſhould have been produced.—It was anſwered, that jectment being a liberal action, and they having only the lands in ueſtion, they could confeſs for no other.

On the other ſide, that the rule which held in all caſes was only o take the beſt evidence of which the caſe would admit.

And if there has been no poſſeſſion under the will, there has been o ſuch adverſe poſſeſſion as might be evidence towards inducing a reſumption againſt it.

Lord *Mansfield*—The caſe is clear—a man by loſing the evi-ence of his title ſhall not loſe his eſtate. If you cannot prove a eed by producing it, you may produce the counterpart; if you an't produce the counterpart, you may produce a copy, even if ou cannot prove it to be a true copy; if a copy cannot be pro-uced, you may go into parol evidence of the deed *.

When poſſeſſion had gone againſt a will for moſt part of thirty ears, and the will from that time, the time of its making, never ppeared, the evidence of the will went beyond the poſſeſſion.——nd here all the family are evidence to this will, by ſigning the curity to the ſpiritual court, by allegation, by all kind of judicial roceedings, and the poſſeſſion has not been adverſe to the will.

Mr. Juſtice *Aſton*—Evidence from the regiſter-book has been ceived in two inſtances. The court of Chancery in the caſe of *orges* and *Foſter*, decreed that the copy or probate of a will ſhould e received in evidence as the original will itſelf.—Now the court f Chancery never decrees that ſhall be evidence, which in its na-re is *not* evidence.

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* Evidentia eſt optima quam res recipiat probatio; in qua ſi ſumma deficiant l ad minima liceat decurrere: nunquam autem per infirmius probare licet; eque ubi fontes ſuppetant rivulos ſectari.

Lord *Mansfield* obſerved, that it being ſtated all the ſubſcribing witneſſes were dead, the laſt in 1736, compariſon of hands wa all the evidence which could be given.

Separate Fiſhery.

THE preſumption is, that he who has a ſeparate fiſhery i owner of the ſoil. Vide *Skinner* 342. *Salk.* *Brook,* title *Peſchariæ.* *Co. Lit.* 121. *Roll. Abr.*

This was upon a caſe reſerved, which was therefore obſerved t require a finding much leſs ſtrict and circumſtantial than a ſpecia verdict. And Lord *Mansfield*, I think, was of opinion, that notwithſtanding Lord *Coke*'s obſervation, the preſumption certainl was, that the man who hath ſeveral fiſheries is the owner of th ſoil; and that Sir *John Davie* obſerves upon *Coke*'s objection to th contrary, and denies it expreſsly; and then if there is no evidenc to the contrary, the preſumption ſtands.

Mr. Juſtice *Aſton*—That notwithſtanding the *dictum* of Lor *Coke* (who yet admits that by the words *aquam ſuam* the ſoil wil paſs) the caſe in *Salkeld* 637. Caſe in *Brooke plac. treſpaſſe* cited b Mr. *Wallace*, and another ſtill ſtronger 436. with Sir *John Dav* go to the contrary.

Curia omnis aſſenſit.

Juſtification.

WHEN three perſons join in one juſtification, the juſtification is good for all or bad for all. *Str.* 1104. quoted.

Tenant from Year to Year.

MORTGAGEE ſerves the tenant with declaration in ejec ment, the tenant defends to the ejectment, under colou that if he did not defend, he ſhould be turned out.

Contended, that ejectments by mortgagees are not conſidered claims under an adverſe title, but as means of coming at the re and therefore notice of ejectment is not neceſſary in ſuch caſes i that manner which is required, where a landlord turns the tena out.

The defence on the part of the tenant was called by Lord *Mansfield* a moſt wicked defence; and he ſaid, that ſuch an objection was never made before as the preſent. The mortgagee when he brings an action of this nature, would never ſuffer the mortgagor o turn the tenant out of poſſeſſion. From year to year, is an eſtate which huſbandry requires to have ſtability, and the law will not efuſe it.

In great eſtates, who gives notice, the landlord or tenants?

I would not have it thought, if the tenants are ready to attorn, nd leave their landlord, giving him notice to defend, that the ortgagor ſhall turn tenant out.

Tenant from year to year, every year is a new demiſe, and may e ſo pleaded.

Mr. Juſtice *Aſton*—The ſerving the tenants with the declaration s the form only by which the mortgagee requires the rent againſt he mortgagor, who is his tenant at will, after the condition roken.

Mortgagee ſays, I come for title on the whole eſtate of the mortgagor, I ſhall not turn out the tenant; if I would, the court vould not ſuffer me.

Lord *Mansfield*—It goes equally to paramount poſſeſſion, and I hink there would have been no difference if it had been a leaſe for ears.

The mortgagee only makes uſe of the proper form: judgment ill go againſt a nominal perſon, and tenant cannot be hurt, if he ill do as he ought, not make any defence.

Curia omnis aſſenſit abſente——Mr. Juſtice *Willes*.

The King *againſt* George.

ON a ſpecial verdict, in which the queſtion principally ariſing was, whether reſiants in a manor within an hundred, owing uit and ſervice to a leet within the hundred, but not comenſuate or co-extenſive with it, the limits of the hundred reaching beond thoſe of the leet, ſhall be obliged to ſerve as conſtables out f the leet, but within the hundred.

Serjeant *Davy*—It was argued that there are two ſorts of ſuits, ſuit-heriot and ſuit-ſervice. Suit-heriot is on commorancy, and ſuit-ſervice ariſes on reſervation.

With reſpect to ſuit heriot, it binds all except biſhops, freeholder and women, and others particularly exempt by the ſtatute of *Marlebridge*—and tenants in antient demeſne, though not exempt by th ſtatute, but on account of the dignity of their ſervice. *Shower* 2 *Ventr*. 344.——It appears by the latter, tenants in antient demeſne may, notwithſtanding, be made conſtables of the hundred.

Fitzherbert 161. folio edition. Tenants in an antient demeſn are not bound to do ſuit at the ſheriff's leet; there is a writ which exempts them, but he does not ſay from being conſtables.

So women are exempt from doing ſuit; but a woman may b cuſtom be obliged to be conſtable. [That is, I apprehend, by finding a ſubſtitute.] Vide *Wood's Inſt*.

3 *Keble* 230. *King* and *King*. Queſtion whether living withi an inferior leet will exempt a man from being conſtable of an hundred? *Hale* ſaid 'twas what the court leet could not meddle wit and the hundred extended beyond the leet.

11 *Mod*. *Regina* and *Jennings*. Court held defendant not excuſed, though an inhabitant of the town of *Farnham*, notwithſtanding it appeared that no man of that town was ever known to ex cute the office of conſtable of the hundred; therefore it will n follow that if a man cannot be obliged to do ſuit in two leets, th he cannot be obliged to be conſtable, becauſe he does ſuit.

Lord *Hale* ſays, he that owes ſuit to the leet, owes none to t hundred, but by cuſtom he may do ſo; and here the cuſtom alledged and found upon the verdict.

On the other ſide by Serjeant *Burland*—Contended, that ſin leets were ſeparated from the tourne, for the convenience of t hundred, no perſon ſhould be liable to do ſervice at two lee eſpecially as when he had found pledges at one leet, all the pu poſes of the antient policy were anſwered. And ſo in *Coke*'s Co mentaries on *Magna Charta*, chap. 10. and on the Statute of *Mar* *bridge*. 'Tis carried ſo far, that if a man has houſes in two lee he ſhall be obliged only to do ſervice where he is reſident; na ſomething farther, that if his houſe ſtands in two leets, he ſhall obliged to do ſervice only where his bed ſtands. *Hawkins Pl* *Cor*.

The court leet is in no reſpect inferior to the juriſdiction of the undred *pro viſu franci plegii*, as the ſheriff's tourne of the hun- red was; and therefore that a perſon doing ſuit at the leet, can- ot be liable to be choſen conſtable.

Regular conſtables are to be choſen at the leet, and the jury who re reſiants chooſe them; they are ſuppoſed to be choſen from mong the reſiants. They could not before the time of *Edw.* 3. which is the æra of the inſtitution of juſtices, be choſen, unleſs reſent at the court leet, for they could not be choſen but in the ourt, and when the ſeſſion of the court was diſſolved, the ſteward's uriſdiction ceaſed.

If they were reſiant, they were obliged to be preſent, or were meſnable to the jury; if preſent and refuſing to be ſworn, they vere ameſnable to the ſteward.

With reſpect to women, it cannot be applicable to the hundred s a cuſtom to chooſe women as conſtables for the hundred; for women were exempted from attendance on the leet. And it has een already obſerved, a conſtable could not be choſen but from hoſe who were preſent at the leet—and beſides, if ſhe could not ind a deputy, and nobody ſhall be obliged to be a deputy, ſhe could ot be obliged to ſerve herſelf.

That tenants in antient demeſne were under a particular exemp- ion: but the non-liability contended for is not in the nature of a articular exemption, but more favourable.

'Tis a queſtion, whether a conſtable is an officer by common aw or by the Statute of *Wincheſter*? The more antient authorities re, that he came in by the ſtatute.

Both theſe courts may be held at the ſame day and hour, and e cannot be attendant on both; and the law will not impoſe an mpoſſibility as a general duty.

It is not ſtated that this is a ſubordinate leet; for where a leet as a particular juriſdiction, it may be otherwiſe, as appears by *Hale's* Pleas of the Crown.

It is admitted too that it may be a cuſtom that the reeve and a ew reſiants may attend, but in the ſame place. *Cro. Ja.* It is ad that all the reſiants ſhould attend.

That it is not found that the manor of *Abbots Wooton* is withi the juriſdiction: But this is not finding that it was ever part or parcel of the hundred. This is not found; if it were, what ſhall w ſay of a freehold which may be within the manor, but cannot b parcel of it.

That the caſe of *King* and *King* in *Freeman* and *Keble* is not ver ſatisfactory authority. Lord *Hale* is made to ſpeak unintelligibly and alſo is made to contradict his own declared opinion in his Ple of the Crown, where he ſays, " conſtables were by the Statute o *Wincheſter*."

That 'tis very extraordinary that no other book ſhould contai theſe ſuppoſed opinions.

As to the caſe in 11 *Mod.* that from 7 *to* 11 *Mod.* is as ba authority as can be. That the reaſons given in the 11 *Mod.* are ſ bad, that it cannot be ſuppoſed they came from the bench. Wha is the lord's having a right to ſit as judge in the leet, to the jury' chooſing a conſtable.

Replication. Serjeant *Davy* in reply—I have found a great part of my argument anſwered as I expected, and ſhall therefore give the court ver little trouble.

That a man cannot be liable to do ſuit at two courts at once becauſe a man cannot be obliged to be in two places at once, or d two incompatible offices at once, I admit, that the ſame faith nee not be given to the public at two leets; this may be good as general argument, but there muſt be a particular cuſtom ſhewn which ſhall make leets as they were once generally, liable.

As to the incapacity of a man's being in two places, I ſhall b diſpoſed to grant it; but what will follow? Not that he may plea a general exemption, but in caſe he be choſen in one court, b may ſpecially plead this to exempt him from ſerving at the ſam time in another: but this will be only an exemption *pro iſta vice* and ceaſe with the particular reaſon *.

My brother farther draws an inference, that becauſe a man cannot do ſervice in different court-leets, he cannot ſerve as conſtable The juries ſay he cannot chooſe a man as conſtable, but who i either reſident and at the leet, or obliged to be there.

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* Ceſſante cauſa ceſſat effectus.

Suppoſing he will not be ſworn, what can be done? Not make him be ſworn, but puniſh him for refuſing to be ſworn equivalent o the amercement at a court leet.

My brother ſays, ſuppoſing there is a cuſtom in general, that eſiants of a leet ſhould ſerve within the leet, though without the undred, yet no ſuch cuſtom is found. 'Tis only ſtated that there s an antient cuſtom, that they *do* ſerve. If a cuſtom is duly found, apprehend that they do, is evidence they *ought*. But, ſays my rother, 'tis only evidence of the fact. I have not ſagacity enough o take the diſtinction; the exiſtence of a cuſtom is evidence of a uſtom, as the exiſtence of a thing is evidence of its being.

The objection is very curious, that ſaying the manor is within he hundred, is no finding it to be parcel of the hundred. How o they uſe the word in other places? The reſiants within a place re reſiants of a place; the reſiants within the hundred, which they peak of before, are reſiants of the hundred. A manor within the undred is parcel of the hundred by neceſſary preſumption, and uſt be ſo underſtood, unleſs the contrary be found.

Next my brother attacks my caſe on the authority of the reporters names, and of the nonſenſe they make the judges talk. As to he names of reporters, were they to ſpeak their own ſentiments, nd we were to judge from them and their language, God help he judges! I wiſh reporters would give us the judgment rather han the reaſons. But if the judgment in both reporters agree, the ourt will look to the judgment and authority of the judges ſo agreeing. As to the nonſenſe the judges are made to talk, that ſhall e placed to the account of the reporters.

Mr. Juſtice *Aſton*—It is ſet forth there is and hath been an hundred from time immemorial, and that the manor is within the hundred; this I muſt take as parcel of the hundred: and it is farther t forth, that from antient time the reſiants were liable to do ſuit nd ſervice at the lord's leet—and farther, that ſuch as were choſen y the jury in the leet have of antient time been uſed to ſerve the ffice of conſtables within the hundred. And the defendant, being ſo choſen, refuſed to take the oath or ſerve the ſaid office.

Whether conſtables were by common law or by ſtatute is not f much conſequence to the queſtion. But by the better and more odern opinion, they are by the common law. As to ſwearing n conſtables, it appears by *Hawkins*, if the party did not take the ath in the leet, before the juſtices were impowered to ſwear him, e was amenable to the next court. I do not reckon women, and erſons under particular incapacities, are within the nature of this ueſtion.

As to tenants in antient demeſne, I am informed from the caſ in *Shower* and *Ventris*, of the *King* and *Betteſworth*, that tenants i antient demeſne were liable to ſerve as conſtables. As to particula inabilities, they would be excuſed when they aroſe; he wiſhe this minuter queſtion to be thrown out of the caſe, and wiſhe the general queſtion to be conſidered, whether reſiants of a court leet within the hundred ſhould be liable to ſerve as conſtables fo the hundred, though not within the leet, but extending beyond it In the abſence of Lord *Mansfield*, he declined giving any opinion.

Quære ulterius de hâc cauſa ſed ut meminiſſe videor curia poſtea cen ſuit contra defendentem et judicium fuit pro Rege.

Outlawry.

OUTLAWRY to be reverſed on terms of payment of coſts appearance, and putting in bail.

Mic. 12 G. 2. Rule of court that defendant muſt enter into term as above, of appearing and putting in bail to a new original.

2 *Str.* 1156. Caſe to the like effect.

The new original muſt agree in the nature of the action, and th ſum in demand.

3 *Lev.* Where the outlawry is reverſed, plaintiff muſt declar upon a new original, if in another county.

It was doubted, whether the words that he *may* declare ſhoul have an imperative conſtruction, he *ſhall* declare.

Mr. Juſtice *Aſton* ſeemed to think they were not imperative and that a new original was only neceſſary where the party choſ to declare in another county.

Rule of Practice.

A SETTLED rule of the court not to enter into any ſpe- cial arguments, the laſt paper day of the term; becauſe i would delay the motions till the next term.

Toll.

New Trial.

ACTION brought by Lord *Gainſborough* as lord of the manor of *G.* for non-payment of toll.

The jury found for the plaintiff.

Motion for a new trial, on the ground that the conſideration laid n ſome of the counts was not ſufficient: and the verdict being eneral upon all the counts, no judgment could be had upon it, ecauſe the conſideration in evidence was inſufficient on ſome, and he jury had found upon the whole matter.

Per Curiam—To prove that the counts as *laid* in the declaration vere inſufficient, is no ground for a new trial: you muſt come in rreſt of judgment.

If the jury find right upon the whole, on the miſtake of not nding upon a right count, the court will be very averſe to granting new trial.

Rule to ſhew cauſe why judgment ſhould not be arreſted.

Indictment.

WHETHER good on 13 *Geo.* 1. *c.* 5. which provides that gatherers of ends of yarn ſhall be brought before a uſtice. Exception therefore was taken in arreſt of judgment, hat the offence was not an indictable offence.

To this Mr. *Buller* obſerved, that the 17 *Geo.* 2. had provided, hat upon *conviction* the offender ſhall be deemed an incorrigible ogue: that the words duly convicted, can only mean on *indictent.*

On the other ſide it was denied that the ſecond ſtatute took away he mode of puniſhment by the firſt; becauſe the object of that ct was to take into one all the different acts with reſpect to varants: and it recites the former ſtatutes without any expreſs words rdering any different mode of puniſhment: ſo that duly convicted nuſt be underſtood in the manner provided by the original ſtatute. ourt were of the ſame opinion; and the judgment was thereon rreſted, and recognizance diſcharged of courſe.

Return.

SHERIFF'S return is not *traverſable*—you can only have an action for a falſe return.

Appointment of Overſeers.

TWO appointments being made the ſame day, and it not appearing which was firſt, the court on the caſe ſtated were immediately of opinion, that a third made the following day muſt be held good, and the foregoing void for uncertainty.

However, a rule to ſhew cauſe was granted, vide *infra*.

Outlawry.

AS to the matter of appearance abovementioned, it was afterwards mentioned in the court that by the ſtatute 4 & 5 *W. & M.* no perſon who ſhall be outlawed for any cauſe, matter, or thing, treaſon or felony excepted, ſhall be compelled to appear in *perſon* to reverſe the outlawry, nor to put in ſpecial bail; except in caſes where ſpecial bail is required, *Salk.* 296. Vide 2 *Str.* 1178. *Senecold* and *Hampſon*.

Rule where Judgment goes by Default.

YOU can't deny the ſubſtantial charge, where judgment goes by default, but you may go to extenuation very properly by evidence.

Compoſition on a Penal Act.

MOTION for leave to compound on the building act by conſent of the plaintiff—the court would not grant the rule as of courſe, for that it might be covin or colluſion.

Court directed that as ſoon as the buildings were finiſhed agreeable to the ſtatute, and the miſpleadings corrected, the motion might be made—in the meanwhile proceedings to be ſtaid.

Coſts.

7 James 1.

IN all cauſes where juſtices of peace, conſtables, &c. do any thing in execution of their office, they may plead the general iſſue; and if verdict for defendant, or judgment by nonſuit, liberty to tax the double coſts.

Hilary Term,

14 Geo. 3. 1774. K. B.

Lee *againſt* Ganſell.

ON a motion to ſhew cauſe why the defendant ſhould not b
diſcharged out of the cuſtody of the marſhal.

The ground inſiſted on to maintain the motion was, that Maj
General Ganſell, the defendant, was illegally arreſted, and the ar
reſt therefore null and void; and that he ought to be diſcharged fro
the conſequences of the arreſt.

Caſe, that the defendant having lodgings to his ſeparate uſe, an
the door thereof being ſhut, the ſame was broke open, contrary t
law, in order to arreſt him. The arreſt thereon bad.

The caſe was ſtated thus, in anſwer to this ſuggeſtion:

Major General *Ganſell* had lived for ſeveral years in lodgings, take
by the year of Mr. *Mayo*; which lodgings had one common entr
into the ſtreet, by the houſe door.

The plaintiff, in proſecution of a debt, with a due warrant, an
the aſſiſtance of divers perſons, entered, by the OUTER DOOR, be

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Note, This caſe had been before in the Common Pleas, on the fourteenth
September 1773. And I have ſeen a printed account of the caſe, which ſays, th
it was tried by Mr. Juſtice *Nares*, on three ſeveral indictments, preferred agai
Major General *Ganſell*, "for maliciouſly and FELONIOUSLY ſhooting at *Jo*
Hyde, bailiff, and others," named in the indictment. And that, as to the poi
of law, Mr. Juſtice *Nares* had expreſſed himſelf of opinion, that the defence
General *Ganſel*, that his houſe was his caſtle, was *indiſputably ſound doctrine.*

The JURY found him NOT GUILTY.

in

ing OPEN, and being in thus, they aſked for the General; but were refuſed, and obſtructed by force: And going up ſtairs to his apartment, found him upon the ſtair-caſe, and were endeavouring to follow him in, and that *Hyde*, the bailiff, ſhewed him the warrant; and, on his getting away from them, as he was juſt entered in at the door, and before he could ſhut it to, got his knee in, and a piſtol was fired at him through the door, thus partly open, by the general; that they ruſhed in, and endeavoured to ſecure him, and he fired another piſtol. That at laſt, however, they arreſted him, by force, in conſequence of his reſiſtance, and for their own ſecurity. And thus that the arreſt was good.

The evidence on affidavits was much the ſame as on the trial in the Common Pleas.

The point firſt relied on in anſwer was, that the arreſt was good, becauſe the door of the lodgings was not broke open; but the ſheriff's officer had firſt made a lawful entrance, by puſhing in a part of his leg; and if he was afterwards turned out, he might well force the door, to execute the proceſs.

The evidence was entered into to prove this part of the caſe.

But if this fact was doubted, then they contended, upon the point of law, that if an outer door was open, an inner door might be broke, and the arreſt legal.

In *Hale's* Pleas of the Crown it has not been ſtated whether the owner inhabited.

That there was a caſe of chambers in a college, and if *A.* letts a chamber, and the door be broke open, you may have an indictment, *quare domum manſionalem fregit*; but this, *ex neceſſitate rei*, leſt juſtice ſhould fail. And the lodging is not the manſion-houſe of the party, to *defend* him from *arreſt on civil proceſs*, though it may be to *ſecure his property and perſon* from *robbers*, and enable him to proſecute *criminally* againſt a *wrong doer*; ſince the owner of the houſe, who was *not* robbed, could not proſecute for the robbery; and it is neceſſary *ſome body* ſhould.

Keiling, 83, takes a diſtinction where there is but *one* common entrance, and where there are divided houſes; for if there be *ſeparate* poſſeſſion, this ſhall of itſelf *only* put the occupant in the ſtate of a *lodger*.

Old Bailey, *Michaelmas* term, Lord Chief Juſtice *Holt*; where inmates have ſeparate rooms, and keep ſtair-caſes ſeparately, yet have entry by *one* door with the owner, the indictment muſt be *quare* *domum manſionalem fregit*, of the owner; and they are not *dom* *manſionalis*, of the *inmates*. An old clerk ſaid, the practice had bee according to *Keeling*'s book, on which Juſtice *Holt* ſaid he grounde his judgment. Theſe apartments were taken by the year, on cer tain rent.

Caſe 13 of his preſent majeſty, *A.* tried for burglary, in breakin open the manſion-houſe of *Chandler*, who was an inmate, and ha taken a parlour and ſhop in the dwelling-houſe of the owne Though the houſe was divided into ſeveral apartments, and th owner inhabits in one of them, yet this was contended to be th manſion-houſe of the owner.

All the judges, on conference, held, that the indictment was we laid: For as the owner inhabits *one* part, there would be *no* remed in ſuch an inſtance, which happens frequently in *London*; but ex preſsly otherwiſe if the owner had inhabited any part.

Farther, it was argued, in the third place, as a very importan queſtion, whether the arreſt be illegal, even taking this to have bee the manſion-houſe of General *Ganſell*.

The ſheriff is to take defendant, if within his bailiwick, *Br* Treſpaſs, 390, where *Littleton* and the reſt hold, that the ſherif on a *fieri facias*, is not warranted to break the houſe, and ſhall b liable for treſpaſs: But the taking of the goods ſhall be excuſed; an accordingly *Dalton*. So that, though they are liable to treſpaſs, the arreſt be *illegal*, in doing what *exceeds* their authority, yet wha is done by authority ſhall be good.

Conviction does not hinder evidence till a man be attainted by judgment.

Objection to reading of *Lee*'s evidence, as convicted of perjury It was held by Lord *Manſfield*, that *conviction* was not ſufficien unleſs judgment thereupon. Lord *Manſfield* ſaid, he thought the did not exiſt a caſe in law, where a *conviction* could be read *befo* *judgment*. A man may move in *arreſt* of judgment.

Mr. *Morgan* mentioned a caſe, in which, he ſaid, the *convicti* was admitted without judgment. They pleaded againſt a woma as *feme ſole*; ſhe pleaded her coverture: And the conviction was ad mitted of her huſband, for tranſportation, in order to *bar* the pl of coverture. And the ſaid plea was accordingly adjudged *inſufficien*

Lord *Manſfield*—This was evidence in a *civil* action, to make th *feme* liable: It went to prove there had been a tranſportation, bu you could not have brought it to have proved a *crime*.

Mr. Juſtice *Aſton* obſerved, that the conviction and order w made by a ſpecial act *ſufficient* evidence. To which Lord *Manſfie*

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farther added, the judge made a regular judgment in felonies for tranſportation; and as *civil evidence* you may read a verdict, but not where a *diſability* is to be introduced on the *crime* of the party.

On the other ſide, in ſupport of the motion on the caſe, as ſtated upon the evidence on their part, it was argued to the following effect:

That with reſpect to *domus manſionalis*, the law had ſpoken with particular regard to the liberty and ſecurity of men in their houſes. But that on all the caſes cited, it appears it would have been burgary to have broke open the apartment or lodging houſe, to have *robbed* General *Ganſell*. And not one caſe, in which the ſheriff can break open the door to arreſt, where to rob it would have been burglary, in the ſame circumſtances. A *chamber* in a *college* would have been protected; and in that inſtance they may be ſaid to have *ll* one door. There is no doubt it would have gained a ſettlement.

As to the right of keeping and detaining on the arreſt, in the caſe cited from *Brooke* and *Dalton*, there is a caſe in *Atkins*, 38, where a petitioning creditor, who could not arreſt, got the debtor where he could be arreſted, and then got his own debt; and from the perſon who might have arreſted, the beneit of the arreſt was taken away, and the bail diſcharged by Lord *Hardwicke*, becauſe the petitioning creditor, through whom he came to the opportunity, had not the right of arreſt.

It has been much relied, that though an action would lie, yet the arreſt ſhould be good, to keep the general in cuſtody. Now wherever a privileged perſon, in conſequence of his attendance on a court of juſtice, is *arreſted*, it does not end by ſubjecting the perſon areſting to an action: But the party ſo arreſted ſhall be diſcharged. And here, that if the arreſt was unwarrantably made, the court will not *permit* the parties to *take advantage of their own wrong*. [*Nemo lucrabitur de injuria ſua propria*.]

Mr. *Dunning* obſerved, that he was glad to find Mr. *Wallace*, and the other gentlemen, inſiſted ſo much on endeavouring to deny the *fact*, as ſtated by the general, becauſe he thence took the liberty to infer, that they did not rely, ſo poſitively as might appear in words, on the point of *law*.

Obſervation on the evidence.

What may be the conduct of the general is another point; though by the *proper* judge, and by the *proper* trial, he ſtands *acquitted* of the *crime*; at leaſt as imputed to his charge. But whatever be his conduct, his birthright here is a law and liberty which he is entitled

5 D to

That the door of his apartment is to a lodger as the outer door to the inhabitant.

to whenever he demands it. Let us obſerve what is the caſ If a ſole individual be the occupant, in that caſe the keeping ſhu his *outer* door may be preſumed a ſufficient defence, it is competen to him to ſhut it: To a perſon who inhabits by a demiſe unde him, in a part of the houſe, this is not competent; the door the of his *apartment* is to *him* the *door* of his *houſe*, as being the onl one which to *him* can anſwer the purpoſes which the outer doo does to the owner.

Domus ſuo cuique caſtellum.

Every man's houſe fortified by the law.

That therefore materials, ſtrength, apartments, inner or outer door, make no difference.

Though it is not always of neceſſity, nor perhaps here, to g upon the *original* foundation of a right of law, yet I will beg leav to obſerve, when we apply the maxim, *that every man's houſe is h* *caſtle*, we mean not to perſuade the inhabiter of a poor hut, th it is provided with *draw-bridges* or *portculliſes*, but only that it under ſuch ſufficient protection as may provide for his ſecurity in more pleaſant, or perhaps, a better way—that it is FORTIFIED B THE LAW. * Lord *Hale* has been cited: but I did not imagin that it would have been contended that Lord *Hale* had been ſo *inacc* *rate* as to have forgot, in ſtating a caſe, the very *ground* on which is to be underſtood to have went. It appears to me, whatever pr vileges an houſe of *ſtone* gives me from arreſts, the ſame *legal* pro tection is given me by a houſe of *mud*. And whether the apar ments be more or leſs, I don't ſee the difference of *reaſon*, and can not, therefore, ſee the difference of *law*. The *leſs* the number apartments, the *leſs* garriſon they will require: and I don't ſe why what ſhould only be ſuppoſed to make it more *tenable*, ſhoul *increaſe* the danger.

That it would be ſtrange if two outer doors ſhould protect owner and lodger, but one the owner only.

That if a lodger may not defend the door of his own apartment, he has no ſecurity.

As to the word *inmates*, I don't ſee it is uſed in an *opprobrio* ſenſe, as next to vagabonds, but it may apply for the purpoſe, the owner had *no ſufficient* nor *ſettled* apartment, but might b obliged to go from room to room as the convenience of the famil required. It would make an odd doctrine in our *criminal* caſes, *two outer* doors ſhould be underſtood to protect *owner* and *lodger* but one door the owner only. The caſe in burglary is certain held, that if a ſhop hired of *B*. by *A*. and *A*. does not *lay* in i no burglary can be committed; becauſe it is not the *dwelling*-hou of the *owner* who has *let* it, nor of *lodger*, becauſe he did not *dw* there: and may it not appear to introduce ſome abſurdity, that th ſame law ſhould be where the lodger does dwell? On that groun it appears to me that neither owner nor leſſee could maintain an in dictment of burglary. And in this caſe too the door of the apar ment is the only defence of General *Ganſell*, not againſt the miniſte of juſtice only, but the profeſſed violators of it. As to the caſe ſtate as lately before this court, what was the *deciſion* makes not again me: and what might paſs after was *converſation*, and not deciſio

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* Similem habemus Demoſthenis præſtantiſſimum & notiſſimum locum, ʼου γαρ λιθοις πλινθοις ἐτειχισα την πολιν.

Ig

I go on to the point reſted on ſo ſtrongly, that the officers ſhall e liable for a *treſpaſs*; but the arreſt *good*. If a treſpaſs be all we re entitled to recover, our ſatisfaction for the breach of domeſtic ecurity will not be worth much. The privilege ſpoken of in erſons going to the *court*, is the privilege of the *court*, rather than f the perſons. And farther, on the general rule obtaining, I aprehend whenever an injuſtice is *done*, the juſtice is to *undo* it: otheriſe it would be *encouraging* much violation of juſtice in the perons themſelves and others. And then without any particular auhority, the name of *J. S.* or any body elſe, he compaſſes his debt f 200 *l.* by a violation of the law—at the expence of 10 *l.* I reover 190 *l.* He will, perhaps, not have always the moſt *profound* everence for the law, to ſuch a degree, as in balance of the account, ot to find himſelf diſpoſed to the violation. As to pecuniary ecompence, it applies but very ill to ſatisfy for the loſs of *liberty*: or the ſpecific injury nothing but a ſpecific remedy is deſired, and he reſtoration of *liberty* can be the only compenſation for the loſs f it.

That treſpaſs is an inadequate compenſation.

That 'tis not like privilege of going to the court.

That juſtice conſiſts in undoinginjuſtice.

That it would encourage injuſtice.

That on ſuch a balance of account, a bad man would be much more likely to break the law, than to fear it.

Libertas non recipit æſtimationem.

Mr. Cox.

Mr. *Cox* deſired to obſerve, that the lodgers and inmates are, pon a computation, underſtood to be about ſeven-tenths of the nhabitants of this city. That an idea he found had been among hem, however wretched they might otherwiſe be, they might each rotect ſecurely his perſon and family under his own lock and key. f this only claim of happineſs be taken from them, from henceorth they muſt not be ſafe in their beds.

Number of lodgers.

An *oppreſſive* creditor may drag him out of his bed, throw him nto priſon, and complete his wretchedneſs.

A duro et inconvenienti.

Mr. Murphy.

Mr. *Murphy* obſerved on the circumſtances which appeared conradictory in the *evidence* againſt General *Ganſell*.

The caſe of Lord *Hales* is not the only one, *Cro. Jac.* fo. 65. nd *Hawkin*'s Pleas of the Crown, both agree that indictments of urglary will lay, and ſeveral chambers ſhall be the *domus manſiona*s. Therefore, ſays *Hale*, wherever there are *ſervants* who have o ſeveral occupancy, it ſhall be the *domus manſionales*; alſo chamers in the inns of court are always taken as ſeparate houſes. And t me aſk whether, if General *Ganſell* had been poſſeſſed of a moſt aluable collection of pictures, and Mr. *Lee* had taken offence and roke into thoſe chambers, ſhould not the indictment have been aid againſt him for breaking the manſion-houſe of General *anſell*.

On the evidence as contradictory.

On the authority as not againſt the caſe, but rather for it.

Another caſe was that of *The King* and *Broſſer*. The caſe was travelling jew had been robbed at a public houſe: it had been ſuppoſed that the publican had aſſiſted and therefore, *propter nece* *tatem*, the indictment was to be laid as for breaking open the hou of his *inmate or lodger*. The publican was afterwards acquitte and therefore the indictment could not be ſupported for defect form, as it ſhould have been (unleſs *propter neceſſitatem*) for brea ing the manſion-houſe of the owner. A caſe cited before Sir T *Clarke*—when the party was impriſoned, and *diſcharged*, the arre having been *illegally* made.

Party diſcharged, where arreſt illegal.

Mr. Morgan on the evidence.

Mr. *Morgan*, upon the evidence as improbable—and that t door might have been broke, and afterwards locked by driving the ſcrews; that with reſpect to the point of law, where the arre had been illegal, the court would not endure the holding over upo ſuch an arreſt.

Inmates.

Mr. *Murphy* defined inmates as *occaſional occupants* only, or in habitants at *will*.

Argumentum a ſimili.

Mr. *Dunning* obſerved, that colleges were antiently called *houſe* and yet every chamber deemed a *ſeparate* houſe.

The caſe ſtood over—

Afterwards 26 *Jan.* in the ſame term, the Lord Chief Juſtic delivered the opinion of the court.

GENTLEMEN,

This is a motion on the part of General *Ganſell* to be diſcharge out of cuſtody; on the ground of an *illegal* arreſt; "for that th officer *broke open* his door, which by *law* he could *not*; and th the arreſt having been in an illegal mode, the law ought to *diſcharg* him, and put him in the ſame condition as before."

There are three defences, I think, made:

1. That the door was *open*; and that the officer having his thig *in*, defended his *entry*.

2. That they had a *right* to break *open* the door, in *exe* *cution* of civil proceſs—no ground is taken that there was *not ſuff* *cient notice*.

3. That the arreſt was *legal*, for they were to take him where ever they could find him; and the only *illegal* thing was, the *break* *ing open* the door, for which there lay an action of treſpaſs, or i the more ſummary mode of proceeding, an *attachment* againſt th officers.

A

As to the firſt, there is *great contrariety of evidence*; and what ould be the conſequence in law, of the door being *partly* open, if e perſon within, *ſtruggling* to keep out the officer, *ſhut* it, I ſhall t *examine*, as I am by no means clear of the fact, as to its cirmſtances: And as I think it may be entirely thrown out of the ueſtion.

The ſecond, whether this door may be broke open in execution f meſne proceſs?—I will ſtate the caſe; and, ſpeaking from meory, you will correct me if I miſtake—I ſpeak for the ſake of e *ſtudents* and thoſe who attend.——The fact is, Mr. *Mayo* was *wner* of this houſe in which Mr. *Ganſell* had a right to two rooms n the firſt floor, opening to the ſtair-caſe; and two on the next, pening alſo to the ſtair-caſe; with the uſe of the kitchen and of garret. It is farther ſtated, Mr. *Ganſell* is tenant for years—tho' at makes no difference—and, which is the *material* thing, that ere was but *one Door* at which both came in. Mr. *Ganſell* was p ſtairs; they went up, giving notice, and *broke* the door open—othing turns upon the notice, or manner of breaking. I ſhould ate that they *entred legally* at the *outer* door, being *open*.

The queſtion is, whether the door of the apartment can be *lawlly* broke open?——Now by the law, the houſe and door have *Privilege* annexed: I forbear giving any *particular Epithet* at prent, to the *Door thus privileged*. But let us conſider what this ivilege is; which is *not* the privilege given by the law to the *Man*, roperly ſo ſpeaking, who *abſconds* from his *creditors*, and evades e proceſs of the *law*, but ariſes from a maxim of *ſound policy*, hereby a *leſſer evil* is *ſuffered* to *avoid* a *greater*, and for the ſecuity of a *greater good*, a *leſs* is *ſuperſeded*.—The *outer* ſhall not be oke open—this is the man's *Caſtle*. The idea took riſe in times f *greater* violence, in that reſpect, at leaſt, than the *preſent*: hen the *protection* of the *outer door* was very *neceſſary* to the inabitants, not only from *thefts*, but from *open violence* of *various* inds. But this *Maxim*, *thus* taken, will not admit of any *equitable* xtenſion or *beneficial enlargement*. Accordingly, in the oldeſt caſe, 8 *Ed.* 4. which gave *riſe* to the *privilege* at all, on the *fieri cias* they entred, and broke in at the *outer* door, and they *deded* that he ſhall *not* break the *Door*; and for that *treſpaſs* lies: ut they broke a trunk in which were the goods; the *taking* of e goods was *lawful*. *Semain*'s caſe, 5 *Co.* in the reign of *Eliz.* e breaking open was *treſpaſs*; but the taking of the goods, tho' e opportunity was gained by treſpaſs, *lawful*. I don't ſay that I ould be diſpoſed to decide *exactly* in the *ſame* manner, in a caſe e *ſame* before me, but to ſhew from the *earlieſt* times downwards ith what *ſtrictneſs this* principle has *always* been underſtood; and *Yelverton* you will find, *Popham doubted* whether the *outer* door was

This ſeems a kind of remitter of th act done to the better ight by which it might now be done.

was privileged; and it was reſted upon the ſingle caſe of *Edwar*
But as to the *outer* door, the law is now *clearly taken*, and the pri
vilege *fully* underſtood.

I don't believe there has been a *ſingle dictum*, or it would hav
been cited, mentioning the *protection* of an *inner* door. In *Hobar*
62. *Hobart* 263. they had come *legally* in at the *outer* door; the
broke the *inner*, and committed many great miſdemeanors: The
were puniſhed for the *miſdemeanors*; but the entry into the lodger'
apartment, (they having once come in legally at the outer door
was held *good*. And yet *one* of theſe was a *very harſh caſe*, fo
they broke in where the man and his wife were in *bed*; and be
haved with *great violence* and *outrage*; but I lay ſtreſs on this
ſhew how *ſtrictly* this maxim has *always* been taken—when th
outer door or window is *ſecure*, and the entry has been lawful an
peaceable by *them*, and when the *due* notification and demand ha
been made and refuſed (to juſtify proceeding to ſuch extremities) th
family are *then* in *ſafety*, and in their accuſtomed protection again
all inſult and injury of wrong-doers from without. And *very late*
the caſe has been very ſolemnly determined in the year 1762, *Af*
and *Pindar*; that was a caſe upon *treſpaſs*; all the other poin
were anſwered, except the breaking of the *inner* door, and it fell i
with ſuch *violence*, that the *officer fell* with it: and it was dete
mined by *all* the *Court*, that the breaking the *inner* door was *lawf*
after the *entry* by the *outer*.

Agreeably to theſe principles, and theſe deciſions, I ſhall cite
very ſenſible diſtinction from a book in my hand, to the point
queſtion.

Foſter, tit. *Hom. c.* 8. § 20. "The *rule*, that every man's hou
is his *Caſtle*, when applied to *Arreſts* on *legal proceſs*, has been ca
ried *as far* as *political juſtice* will *warrant*; and perhaps *farther* th
in the ſcale of *reaſon and ſound policy* this *will warrant*. In the ca
of *Life*, as we have before hinted *generally*,—but in the caſe
life more particularly,—this *Privilege*, and the maxim which ſu
ports it, will admit of *no* extenſion. It muſt be confined to brea
ing of the *outer* door, or window, for the protection of the famil
and ſecurity from without; and it *belongs* to *thoſe* whoſe *Domic*
it *is*; for it is not the *Sanctuary* of a *Stranger*. And when a m
eſcapes from the arreſt, he is *not* privileged by his houſe."

The queſtion now is come to this——"Whether this be
Houſe?" Every *Houſe* certainly muſt have an *outer* door.—It h
been ſaid, that *Chambers* in colleges are *Houſes*, and *Chambers*
the Inns of court, and *Burglary* will lie. Why they have eve
one of them an *outer* door, which protects from *without*; th
have *ſeveral* occupants, and *no* others *dwelling* in them. In *Li*
coln

n's-*Inn* they may have eſtates of *Inheritance*; in the others they ay have eſtates for *Life*; and in *Colleges*, as long as they *reſide* ere. And in the caſe which has been mentioned of *Newcaſtle-ouſe*, they may have *ſeparate* fee.—They have *two outer* doors.—hen the *Owner* of the houſe has nothing to do with it, but a cel-r or ſtable, there *burglary* muſt be laid in the houſe of the *Lodger*; but if otherwiſe, and there are lodgers in the houſe, who have t an outer door, there burglary muſt be laid in the houſe of the wner.

With reſpect to the opinion of Lord *Hale*, *great* as the *Autho-ty* is, perhaps it is not clearly *expreſſed*; or was *not fully reported*, ccording to his *Meaning*; or might not be *ſufficiently Conſidered*. t *all* events, we cannot decide upon a *Single* and *Uncertain* deter-ination, againſt ſo *many clear* and *poſitive Deciſions*, againſt the *ldeſt* caſes, *confirmed* and *recognized* by the moſt *Modern*, and ainſt the moſt *eſtabliſhed Principles* of the law.

If there were nothing elſe againſt the propoſition, which it has xhauſted ſo much *Learning* and *Ingenuity* to ſupport, it might confuted from the *Abſurdity*; for whereas the *largeſt* houſe in *ondon* is protected by but *one* door, General *Ganſell* had *four Doors*, four *Houſes*, within *One*, to protect him: And there had been eater pretence, if it had been on the firſt ſtair-caſe, which was he firſt door of his they had come at.

With reſpect to *Relief*, it is not *material* to ſpeak; the *behaviour* f the party might induce the court to *refuſe relief*, in a *ſummary* ay: Though when a perſon is arreſted in attending the proceſs, he court has interpoſed, not only by *puniſhing* the officer, but by *iſcharging* the priſoner out of cuſtody—but this would *greatly* turn n the *diſcretion* of the court; and this is not a caſe of that na-ure.

We are therefore *All* of *Opinion* that General *Ganſell ought not to* *Diſcharged*.

Gaming.

Jones *againſt* Randall.

23 *April* 1774. K. B.

23 Ap. 1774. K. B.

DECLARATION that there was a promiſſory note on a *wager* given to the plaintiff by defendant in caſe of a *decree* n the court of Chancery ſhould be reverſed in the *Houſe* of *Lords*, o which decree the perſon who had laid upon the reverſal was

I party,

party, and had ſet off his loſs by the reverſal, upon which the deciſion would be againſt him by his gain upon the wager if it ſhoul be reverſed. They gave in evidence a copy of a minute-book o the Houſe of Lords.

Verdict for the plaintiff—upon which motion for a new tria becauſe evidence inſufficient. Lord *Manſfield* being againſt the upon that point, there was another—that the contract was illegal So that the points in this caſe were two.

1. That the evidence was inſufficient, which went to the ne trial.

2. That the contract was illegal which went to the motion i *arreſt* of *judmgent*.

Mr. *Wallace*—That the contract was neither dangerous nor immoral, nor yet illegal, becauſe no poſitive law againſt it, an becauſe a fair wager.

Mr. *Manſfield* upon the ſame grounds—and that if wagers of indecorum were not only not to be encouraged, but even muſt be diſallowed as illegal, then a wager upon the life of a father and of a aunt againſt a grandmother bad—alluding to a caſe.

And that there will be leſs danger of unfair and immoral contracts, becauſe the advocates cannot be bought off; and much le the Lords. That it would be leſs dangerous than any other; becauſ few *gameſters* held *any* ſubject ſo *little intereſting*, and had *none* the knew *leſs* about.

As to the *contempt* of the court, how does that appear? It ma naturally happen that both parties, ſuppoſing the court will decid right, diſpute as long as *Reaſon* and *Argument* will hold out, an then come to the *dernier* resort, a *wager*; and if it be a *contemp* to ſuppoſe it *uncertain*, which way a court of *law* or *equity* ma decide, how happens what we obſerve daily? How *few* lawyers will venture to pronounce a point of law *certain*; and one of the counſel, having looked in his note-book, might ſay, 'ti *very clear for you*; another—I think, Sir, the weight of authoritie makes *againſt you*—and a third, I wiſh you ſucceſs, but indeed 'ti *doubtful*—what ſhould a man do, a *great* part of his fortune *depending* upon the *event*? What would a *prudent* man *ſay*, but la the wager in order to be *ſafe* at all events. The *knowledge*, o more truly the *ignorance*, of both parties in this caſe was equal; an the ſtakes equal.

Mr. *Dunning*—That whatever would be law to Mr. *Jones*,
ould be law to *any* other perſon of *whatever profeſſion* or *know-*
dge. That the *contempt* was *evident*, admitting the propoſition that
he laws of this country were *certain*; that the judges *knew* them,
nd would *decide* accordingly. That to make the wager *fair*, the
ws muſt be ſuppoſed *uncertain*; and the judges ſo *ignorant* as not
o *know*, or, knowing, ſo *wicked* as not to decide accordingly; and
hough the learned gentleman abſtained in *words* from comparing
t with a *lottery*, yet he muſt in *idea* to juſtify his motion.

The caſe of Lord *Marchmont* was only upon the different abili-
ies of counſel; and upon a queſtion of *Fact* unknown to either
arty; and for all I know *equally probable*, whether Mr. *Pigot* or
Coddrington was *then alive*. That to lay a *wager* of the ſort of
his, *now* before the court, was as if a man were to lay a *wager*
pon the *truth of a mathematical propoſition* with which he was well
cquainted. I hope your Lordſhips will ſhew that determinations
f law are *certain*; and too *ſerious* to be treated like matters of the
eaſt and moſt *deſpicable* regard, things of mere chance.

Lord *Mansfield*—This caſe muſt be taken upon the count in the
eclaration; and in declaration it is ſtated as a *wager*. The ap-
eal *depending*, and the perſon who made the wager a *party*, if he
on, the money was to pay the *loſs* of the *Suit*; and if he *loſt*, he
as to *receive* the very ſame ſum out of what he *recovered* in the
vent of the appeal. There is no *inequality*, therefore; now the
queſtion is, whether this *Wager on ſuch* circumſtances ſhall be
maintained?

There is *no poſitive Law*: Many things are bad by *that*, which
therwiſe were *not*. There is *no poſitive Law*, nor *any Caſe* in the
ooks; but Mr. *Dunning* argues *rightly*, and I think very *conclu-*
ſively, that if it is *bad upon principle this is ſufficient*. The *Law*
would be a *ſtrange Science* if it reſted *ſolely* upon *Caſes*; and if after
o *large* an *increaſe* of *Commerce*, *Arts* and *Circumſtances* accruing,
e muſt go to the time of *Rich*. I. to find a *Caſe*, and *ſee* what is
Law. *Precedent* indeed may ſerve to *fix Principles*, which for
Certainty's ſake are *not ſuffered* to be *ſhaken*, whatever might be the
eight of the *principle*, *independent* of *precedent*. But precedent,
hough it be *Evidence* of law, is not *Law* in itſelf; *much* leſs the
Whole of the *Law*.

Whatever is *contrary*, *bonos mores eſt decorum*, the *Principles* of our
Law prohibit, and the King's court, as the *general Cenſor* and *Guar-*
dian of the *public Manners*, is *bound* to *reſtrain* and *puniſh*. Now
ere is a *Wager only* to ſecure the *preciſe Sum* which defendant would
e to *pay*. *Both* parties of *Equal knowledge* or *Equal ignorance*. *

Vide the caſe in Burr.

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* Par ſcientia pares contrahentes facit.

If *indeed* any thing had come out upon the caſe, though appearing under *Colour* of a *Wager*, to *cover* a *Corrupt Agreement*, then the court upon that coming out would *certainly* have *Defeated ſuch* a *purpoſe*.

It is ſtated in *Puffendorf* and *Grotius*, I think, amongſt *evaſions* to *ſimony*—ſpeaking to a perſon, I will *bet* 10,000 *l.* I *don't get* the biſhop—rick: this was *evident Corruption*.

If this had been a *bet* with one of the Lords, this was a *bribe*. If it had come out upon the caſe that it was a *corrupt Agreement*, in order to get *uſury* upon money lent by the event; or to receive *part* of the *thing* in *debate*; * this the *Law* would diſallow. It might have been *very bad* had it been between *Party* and *Attorney* or *Advocate*.

* Which is champerty.

Here it was *only* a man's *Inſuring ſomething* at all events. If there were ſeveral policies, it might be a *large* ſum, and the event might be the loſs of a man's *whole* fortune, upon which he might have a reaſonable deſire to ſecure *ſomething*.

It is argued upon the doctrine of *Predeſtination* that the event is certain: (that is, *Certain when* it ſhall *happen:*) but in *Truth*, the perſon who laid the wager, laid with the *preſumption* of the caſe *againſt* him, as a *Decree* of the court of Chancery had been on their ſide, which the preſumption, in ſome meaſure was, would *not* be reverſed. But the *Law* is *certain*—it were very *unhappy*, gentlemen, for *you*, if it were certain to every man, *before* the *Deciſion*. But this *Certainty* is *ſo Uncertain*, that it requires a *great deal* of *money* to come at the *Laſt* opinion of what is law. As to Lord *Holt*'s caſe, [which Mr. *Dunning* had apologized to his Lordſhip for alluding to] I know not whether there ever was ſuch an one: but there might be circumſtances of *Inducement*, which might warrant his declaration. I remember Dr. *Sherlock* ſaid, on mentioning what *eccleſiaſtical Judges* they had, that a *Surrogate* had pronounced upon a point—a *Barber* by ſaid, I will *wager* a *crown* that is *not Law*; the *Surrogate took* the *Bet*, and went to a *Doctor* of *Law* to aſk his *Opinion*.

I think, if *any* kind of *betting* was to be *tolerated*, it would be *this* in the caſe before us *now*, in order to *oblige* gentlemen to *ſtudy ſo hard*, that they would *venture* their *money* their *opinions* were *right*: And it is a *wager* not likely to be *very frequent*. Is it then againſt *good Policy*? It is no more than on a *fair Bet*, an *endeavour* to ſecure *Something*, let the event fall as it will; in a matter where men of *great* parts and *learning* might have *very different* opinions, and the reſult *impoſſible* to be *foreſeen* by men in the *ſituation* of the

Parties, *before* the *Event*. Nor do I ſee a *Diſreſpect*, either relying ſo ſtrongly on each ſide, that their *own* opinion was *Law*.

There is on the *Whole*, I ſay, nothing againſt *good Morals* or *Policy* to affect the *Contract*, or induce *Us* to *declare* the Plaintiff ſhall *not* recover.

All the reſt of the *Judges* of the *ſame Opinion*—abſent *Aſhburſt*.

Lord *Mansfield* obſerved farther, that if there ever *was* a ſuit to authorize a wager, this was *one*. His Lordſhip ſaid, when he went down, and ſaw the reaſons of the caſe, he only conſidered what coſts. But Mr. Solicitor-general, in opening, went upon the caſe of *Perryn* and *Blake*, *expreſs* limitation, and afterwards very *ſtrong* words.

You will follow my ideas immediately (ſaid his Lordſhip.) I aſked him, " Mr. Solicitor, you don't mean to argue upon this? It " is not in the *reaſons*." " No; but they have *altered* their grounds." However, I deſired the caſe might be confined to the reaſons ſtated in the *printed caſe*: And upon *them* the *decree* was *affirmed*.

Note, This is a very *ſpecial* caſe, and ſeems not intended as a *precedent*, except where there ſhall be almoſt an *identical* parity of circumſtances. The *exact equality*, and it being between *parties* in the ſuit, and to *balance* in part the *loſs* or *gain* on the event, appear the *principal* grounds.

As to the point of evidence, and objection that only a copy was read, and only the petition and decree, whereas they inſiſted, the original ſhould have been produced in evidence, and the previous proceedings, as bill and anſwer, and decree in Chancery read, as in a verdict, which, they inſiſted, could not be read in evidence, unleſs declaration and plea were read, and ſo of the reſt of the intermediate proceſs.—

Lord *Mansfield* ſaid, I remember Mr. *Onſlow*, in the caſe of Sir *Watkins Wynne*, inſiſted on the COPY being read of the HOUSE of COMMONS, and though I had the original papers by me, [as counſel] I did not dare read them, as Mr. *Onſlow* inſiſted on the point of dignity of the Houſe. But what defeated Mr. *Onſlow*'s objection of dignity was, that the HOUSE of LORDS is a COURT of RECORD, but the HOUSE of COMMONS *not*.

And I remember a caſe of law to this point, which I learned very early the firſt year, upon the northern circuit. I was not in the cauſe, but was one of the by-ſtanders. There was occaſion to read the minutes of the HOUSE of LORDS in the caſe of Lord *Derwentwater*. Sir *Thomas Bootle inſiſted*, the minutes could *not* be read, becauſe they were not on *ſtamps*, and he *ſucceeded*. But, as ſoon a it was over, he whiſpered me, "It is very well; but ſtamps were "*not* neceſſary."

On my return I enquired in town, and found that ALL th JUDGES of ENGLAND were AGREED, that the MINUTES of th HOUSE of LORDS were not within the act of Queen *Anne*.

RULE DISCHARGED.

Lodge *againſt* Porthouſe.

Award.

ON a rule to ſhew cauſe why an *attachment* ſhould not iſſue fo *non-performance* of an *award*.

In anſwer to the rule, it was alledged, firſt, that material witneſſes were not heard on the ſide of the party complained againſt, within the time prefixed for making the *award*.

Secondly, that the *award* was *executed*, or appeared to be *executed before* the *day*; and *after* by *eraſures*, the day, &c. was *altered*, to make it appear to have been executed on the day.

Lord *Mansfield*—Does the party ſay in what the witneſſes were material?

Contended, that when witneſſes were unſworn, they were not under the preſumption of being *immaterial*, if they had been examined, when the *requeſt* was made in *time*. And that even *farther*, the arbitrators themſelves had *promiſed* to *hear* them. And that they had not anſwered by *denying* the refuſal.

Lord *Mansfield* obſerved, that if the party had been adviſed by any counſel who was a friend, he would have been deſired to refer. The defendant had paid 3 *l.* 7 *s.* 6 *d.* into court; ſo far was *payment*. The only queſtion was, whether plaintiff was entitled or no. There was beſides two guineas and an half, for rent, demanded; ſomething for wood, about two ſhillings; and another demand of furniture for ſtalls.

There is a contrary demand of a right to paſſage.

If he the plaintiff did not recover *more* than had been paid into court, he was *liable* to *coſts*.

The rent was a *falſe* demand: It was putting them *unjuſtly* upon proving payment; which they did by producing the receipt.

As to the ſecond, it was admitted by the defendant.

As to the third, the arbitrators, from their own acknowledgment, compromized it, by cutting off one fourth.

What then was there to be proved?

After *one* hearing, however, plaintiff alledged he had a material witneſs. One of the arbitrators excuſed himſelf from hearing him, as not being at leiſure at the time deſired; but that the other would hear it.

Accordingly *one* witneſs only appeared, and proved only what the defendant had admitted.

The plaintiff deſired to produce farther evidence.

And does it not appear, in ſo ſhort a time as between the firſt and fifth of *November*, this conduct was driving off the matter, with a view that the time might be expired?

The arbitrators poſtponed making their award, and offered to hear the plaintiff's farther evidence on the 25th of *November*, and gave notice that on the 28th they ſhould make their *award*.

Between the firſt and fifth of *November* can he complain of want of notice? Attorney for the defendant is met by the plaintiff's agent, on the road; and agent of the plaintiff is told of the time appointed —to which the anſwer was, that Mr. *Lodge* was not able to have his witneſſes, or to be preſent himſelf then; but that he ſhould be at leaſt any time between the firſt and fifth of *November*. He has five days previous notice. He was an attorney, as appears by the affidavits, *reſident* upon the place; nor does he ſhew why he could not have his witneſs *then*.

This behaviour is driving them about, and putting them to the expence of this circuity, after all the coſts of the *arbitration*. The ſum demanded, ſo far as is proved due, is a little ſhort of what was *paid* into *court*: The alteration of the date proceeds from his *own* requeſt of farther *time*.

Therefore, let the RULE to ſhew cauſe why the AWARD ſhould not be *ſet aſide*, be DISCHARGED with coſts;

And the RULE of ATTACHMENT be made ABSOLUTE.

Mandamus.

To a Steward of a Copyhold Court to admit.

MOTION for a *mandamus* to a *ſteward* of a manor to admi

The ſteward, in anſwering to the rule, ſtated, that the perſo claiming to be admitted claimed under a will, with other deviſees and that the claim of thoſe deviſees had been found *void*, by reaſo of *inſanity* in the teſtator.

To this the party applying for the *mandamus* replied, that by th finding of *void* deviſes, as to the *other* deviſes, it did not *appear* th the title of the deviſee now claiming was affected; for that the de viſees claimed under codicils, at the time of which the teſtator migh be inſane; but not therefore of courſe at the time of making hi will.

Mr. *Bearcroft* ſaid farther, that this was a caſe between a *cuſt* *mary* heir and a deviſee: That a cuſtomary heir might try his titl *without admittance*; but no other perſon *could*.

The tenant is in by admittance only according to the quality of his eſtate in his true right: and the lord, thro' his ſteward, is only an inſtrument of cuſtom to convey that right. V. Coke's Complete Copyholder.

Lord *Mansfield*—The *deviſee* will ſhew his *deviſe*; which will b *ſufficient* to *protect* him againſt being *turned out* by the *heir*.

But there is cauſe enough, from what has appeared of the refuſal o the ſteward to admit, to grant a *mandamus*. This refuſal *cannot* b for any *good* reaſon: The admittance is no title by itſelf; nor would prejudice an adverſe title;* the ſteward would have a fee the more And his ſtanding in the relation of father to the heir at law, beſide adjourning the court to avoid admitting, increaſes the ſuſpicion.

RULE ABSOLUTE for a MANDAMUS.

Arreſt.

IF a bailiff hath made a *legal* arreſt in a ſtreet, and the priſoner eſcapes, bailiff may juſtify, on a *freſh purſuit*, *breaking* open the *door* of the houſe, to *retake* the priſoner.

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* Quicquid in cuſtodiâ legis eſt invita lege evadere non poteſt.

New

New Trial.

ON a motion for a new trial, on a ground ſuggeſted of the jury finding expreſsly againſt evidence.

This was on an action of treſpaſs. The treſpaſs declared on was reaking into the plaintiff's ſhop, when his goods were upon auction, *amaging* his goods, and *obſtructing* the ſale. No damages proved. ord *Manſfield* ſaid he left it to the jury, upon the damages on the ial. They found for the defendant: He declared himſelf not diſatisfied; and ſaid, he thought they ought to *waive* their motion; or if they went to it again, they might probably recover ſixpence, hich would be all they could *deſerve*.

Vide Bur. Farewell *and* Chaffey, p. 54.

Arbitration.

Coſts.

COSTS of arbitration, to abide the event. The meaning of this is, that the party who prevails with the arbitrator ſhall e in the ſame ſituation, as to coſts, as he would have been on a erdict. If on loſing the cauſe he would not have been ſubject to he coſts of the cauſe on a verdict, neither is he on an arbitration; or in that caſe ſomething *ſpecial* muſt be inſerted on the order, ithout which he cannot be liable to other coſts (upon the general irection of coſts to abide the event) than he would have been on verdict.

Coſts of arbitration to abide the event means ſuch coſts as might have been loſt or gained upon verdict.

And it is *always* drawn ſo, unleſs there be ſpecial directions to he contrary.

The expreſſion means the coſts of the cauſe to abide the event in *uch manner* as they would have done on verdict. Therefore *executors* are not liable under ſuch general words other than they would ave been upon a verdict.

New Trial.

Rex *verſus* Greg.

Indictment.

ON an action tried at the *Middleſex* aſſizes, before Mr. Juſtice *Aſton*, on two counts.

One for driving a dray in ſuch manner, that *caſually* and by *is* *fortune*, the horſes being *careleſsly* driven, the off wheel ran ove one *E. A.* an *infant* of two years old, and *killed* her on the ſpot.

The ſecond count was, for *careleſsly* and *negligently* driving th horſes; by which *careleſſneſs* and *negligence*, many of the king's ſub jects were *frightened* and greatly *endangered*.

The jury found againſt the defendant, on *both* counts.

Mr. *Dunning* objected, that on this driving, and the accident *ca* *ſually*, and by *misfortune*, and ſo ſtated in the indictment, *no offenc* is ſtated.

But that particularly on the ſecond count he meant to take his ex ception, as that whereon *no offence* could be pretended to b charged; though, he ſaid, he was very ready to meet them on th firſt.

Court aſked, whether there had been any *coroner's inquiſition* o the body; which it appeared there had *not*—much to the *diſſatis* *faction* of the *court*.

Rule to ſhew cauſe.

Vide 1 Hale, c. 39, p. 476, expreſs to this point.

Note, The firſt count ſeems to charge, *very clearly*, an *offenc* *amounting* to *manſlaughter*, a *negligent careleſs* driving in a *pub* *lic* ſtreet in *London*, whereby an *infant*, unable to get out o the way, was *killed*. And the reaſons and authorities ſeem t be clear, that ſuch a driving through a crowd would have bee *murder*, without any *expreſs* or *particular* malice proved.

Accidentally and *caſually*, by *itſelf*, charges *no crime* at all; it i only *homicide per infortunium*; yet the thing which cauſed the deat is a *deodand*. But *negligence* and *careleſſneſs* is a *crime*, and *at lea* *manſlaughter* when it produces *death* of an *human creature*; nay very *wilful* and *obſtinate negligence*, as driving through a *crowd*, o ſhooting at random through a crowd, though under excuſe o ſhooting at a mark beyond, will be *murder*. So throwing *tiles*, o the like, off an houſe, without giving notice, in a ſtreet wher many people are paſſing, if any one be killed, it is held it will b murder.

And any killing, not juſtified by neceſſity, or the command o law, nor *purely accidental and involuntary*, not depending on the *car* or *will* of the perſon by whoſe means it happened, will be *murder* o r *manſlaughter*, according to the circumſtances. Vide 1 *Hale* and urn, title *Homicide*.

——— Nicholls.

MOTION to ſet aſide an award, as againſt evidence.

There was a counter-motion for an attachment for non-perform-nce of the award.

It was diſputed between the parties on a leaſe for fourteen years nd an half, and rent 14*l. per annum*, and covenant that half a ear's rent ſhould remain in the hands of the tenant till the laſt ear.

Queſtion, whether the firſt or laſt year was meant in which the alf year's rent was intended to be retained.

Lord *Mansfield*—Where is the doubt? The *current* half year is o be in the hands of the tenant, and the half year to be paid when he *next* becomes due.

It appeared, however, the tenant had *three quarters* of a year in rrears, inſtead of half an year.

Lord *Mansfield*—It would be *ruin* to grant his motion: He has hree quarters of a year in arrears, inſtead of *half* an year.

RULE to *ſet aſide* the AWARD muſt be DISCHARGED; and the ULE for an ATTACHMENT goes of COURSE.

Prideaux *againſt* Arthur.

Information for a challenge to a juſtice of peace.

Court will not grant an information, where the charge is made under falſe or ambiguous colours, where the words ſpokn admit of a favourable interpretation; where the party complaining comes late.

THIS was on a motion for an information againſt an attorney for inſulting and challenging a juſtice of peace on ſuch a ay, he the juſtice *then* ſitting in the execution of his office.

It appeared that the attorney called on the informant on a day of ſſion's buſineſs, when he deſired of one of the juſtices to know hen he might ſpeak with Mr. *Prideaux*; who told him—after inner. Then the attorney, who repreſents himſelf as aggrieved y a charge from a man who came as from Mr. *Prideaux*, of an

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impoſition on the pariſh by a falſe bill, and alſo of the ſame char in a letter, threatning to ſtrike him off the roll if he did not cle himſelf of every particular—the attorney repreſenting himſelf ſurprized by this meſſuage, ſent and delivered in the preſence many of his clerks, and a poſitive declaration he ſhould be ſtruc off the rolls—he therefore told Mr. *Prideaux* (as he ſtates and confirmed by two witneſſes) that he expected ſatisfaction, or w determined to have *ſatisfaction, if the laws of his country would gi it him.* Mr. *Prideaux* ſays, that he the defendant ſaid, he expec ed the ſatisfaction of a gentleman, but he ſays alſo, the attorne offered him the complainant fifty guineas if he would ſay the bi was falſe: meaning, as he believes, to have an action. This paſſe when they were at wine after dinner.

The court from this, when the repreſentation would have le any one to think, that the inſult ſuppoſed to have been offere happened in the actual execution of his *office*, and buſineſs of a *ju tice*; from the ambiguous manner in which the complainant ſwear —namely, that the defendant demanded the ſatisfaction of a gentle man, or uſed words to the like effect—whereas the complainan himſelf appears to have interpreted as the attorney complaine againſt repreſents, if the laws of his country would give it; * and laſtly, from the lateneſs of the application—for the ground complaint above ſuggeſted happened in Trinity term laſt—for a theſe reaſons the court refuſed to interpoſe in a ſummary way.

* Verba non accipenda in duriori ſenſu contra legem ubi in mitiori ſenſu et legitimo competant.

RULE DISCHARGED.

Attorney.

Service of Apprenticeſhip.

AN attorney took indentures for the ſervice of a clerk—Th attorney died before the time expired; articles of aſſignmen were entered into, but failed of ſufficient execution in point of form On theſe circumſtances the court conſidered as I took it, that th ſervice continued under the old maſter in order to make it good there being no defect in the clerk—*ſed qu:* Whether the caſe were not, that the articles of aſſignment were deſtroyed by accident.

Seducing Artificers.

ANY of his Majeſty's ſubjects ſeducing artificers to work abroad, the penalty by 23 *G.* 2. is 500*l.* beſides impriſonment.

Patent.

For new Inventions.

T does not ſeem to hold true, that a patent cannot be good for a *new* invention *grafted* upon an *old one*. *Per* Lord *Mansfield*.

Bail Bond.

ASSIGNMENT of bail bond by ſtatute 4 & 5 *Ann.* gives a diſcretionary power to the court to ſtay the proceedings.

Venue.

MOTION by defendant to change the venue from *London* to *York*, on an allegation that the cauſe aroſe at *Newcaſtle*; and lſo that ſeveral material witneſſes reſide in the ſame town; nor does e believe any witneſs *neceſſary* to the plaintiff lives out of it. It was n action on a policy of inſurance.

Court: The plaintiff has his *election*; and unleſs upon ſpecial ircumſtances, the defendant cannot change to a county where the cauſe of action did *not* ariſe, except by conſent. Particularly, the enue could not be tried at *Newcaſtle*, becauſe there are *no aſſizes* here *this* year; and a policy of inſurance (even if there were not his reaſon,) might as well be tried in *one* place as in *an other*.

Leave to Compound on the Building Act.

MOTION for leave to compound on the building act on payment of coſts granted; but the court diſapproved this motion, by which the poor were to get nothing, and the plaintiff pocket the coſts.

Marriage.

MOTION to diſcharge a woman out of cuſtody, it being ſuggeſted that at the time of application, and at the time f her being taken into cuſtody, and ſince, ſhe was and is a *married woman* and her huſband then and now living, and that ſhe was taken in arreſt upon a civil action.

Court refuſed to diſcharge her upon motion, there being evidenc of the marriage, but none of their ever having *lived together*, or co habited; and they ſuſpecting pretence or *colluſion*.

Irregularity.

DECLARATION on *debet* and *detinet*; original on th *detinet* only: The court ſeemed willing to conſider ſuch vari ance if poſſible, not fatal.

30th January.

30th *January* being *Sunday*, the day was kept the next day after and the court did not go into buſineſs on 1ſt of *February* the Monday.

Common Pleas

Half-blood not inheritable. Vide Black. Comm. L. 2 Ch. 14. ſec. 6. and the Caſes there cited of 10 Aſſizes 27 and Mich. 19 Ed. 2. folio 628 of Maynard's Edition; but note it is not an impediment to deſcent of eſtates tail, nor to ſucceſſion to the crown.

ON the maxim, that the whole blood only muſt inherit.* Lord Chief Juſtice *De Grey* obſerved, there was a very ſenſible diſtinction in the old books *Bracton* 65. *Briton* 251. and *Fleta* that the heir of the half-blood ſhall take by *deſcent from the father* though *not by purchaſe*.

But this, though it is evidently an hardſhip to a family not to b able to adopt it, cannot be *now adopted*.

The caſe appears to have been—

A man ſeized in fee of an eſtate, marries, and has two daughters; his wife dies and he marries again.

The eſtate in fee deſcends to the two daughters as heirs to thei father: The mother-in-law entered and took the rents, and they all lived on the eſtate.

Afterwards a poſthumous ſon is born of this ſecond venter. Queſtion whether after the deceaſe of the daughters, the ſon could clai the inheritance as deſcended to him.

The maxim was quoted, *poſſeſſio fratris de feodo ſimplici facit ſororem eſſe hæredem*; and therefore that the converſe ſhould hold i the ſon had been a brother of the whole blood, but that the ſiſter had been in poſſeſſion under the deſcent, and that therefore the poſthumous ſon could not take, as being only of the half-blood to them who were laſt ſeiſed.

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* Hæres non poteſt eſſe de dimidio ſanguine
Seiſina facit ſtipitem.

Agreed, that it is not neceſſary to receive rent, or that rent ſhould become due, to make actual poſſeſſion.

Moore 151. 3 *Cro.* 4 *Inſt.* 14—5.

That entry will be as good by actions as words.

That actual ouſter may be qualified. 275 *Roll's* Abridgment, where one as guardian in ſocage enters; it is at the *election* of the infant to treat this as a diſſeiſin, or entry for his advantage.

Cro. Car. 303. Lord *Effingham's* caſe in the name of *Blundell* and *Ball.*

The mother might have entered for her quarentine, which continued nearly to the birth of the poſthumous ſon; and therefore her entry is not to be preſumed a diſſeiſin. 1 *Roll's Abr.* 740—1.

It ſhall not be in the power of a perſon who may enter *lawfully*, to make his entry by a *diſſeiſin*, to the prejudice of him who hath a right; and ſo to do that by *wrong* which he cannot do by *right.** 1 *Roll's* 618. where a perſon enters as *guardian*, he ſhall not, by making a leaſe and reſerving rent, make a *diſſeiſin.*

V. the caſe of Tracy Atkins, 4 Bur. 1 vol.

But here the misfortune is, that the *election* not being made in the life of thoſe who had a right to make it, it cannot be made afterwards.

If there had been no daughters, the poſthumous ſon born in the houſe is *actually* ſeiſed, and the law, if neceſſary, would explain the entry of the mother as the entry of the ſon; (*Moore* 151.) and the poſſeſſion of the mother as the poſſeſſion of the ſon. But here the eſtate of the daughters is interpoſed who were laſt ſeiſed, and the poſthumous ſon cannot therefore *claim* through them, he being of the half-blood; and he who will take as heir in fee-ſimple, muſt make himſelf heir of the *whole* blood to the *perſon laſt ſeiſed.*

Though it is *hard* law, and we ſhould have been glad to find it otherwiſe, yet, as the inheritance deſcended on the daughters, and was not *ouſted* by the *entry* of the mother; and no election was made in the life-time of the daughters, and the entry of the mother was in the *poſſeſſion* of the ſon, we muſt determine accordingly That the poſthumous ſon cannot take.

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* Quod fieri vetatur ex directo vetatur etiam ab obliquo
Nemo lucrabitur de injuriâ ſuâ propriâ.

It is clearly and rightly admitted that the poſthumous ſon canno be aided by the ſtatute of *W.* which relieves only in the caſe of remainders.

Poſtea muſt be returned for the leſſor of the plaintiff.

Cuſtom.

CUSTOM alledged in the manor of *Kings Swinford*—that man may be tenant by curteſy.

Alſo, that eſtates within the manner are intailable, and that *recovery* is abſolutely neceſſary to bar the eſtate in tail; where a fin would be neceſſary to bar at common-law.

Contrary evidence, ſometimes of barring by ſurrender, at othe times by recovery. The judge upon the trial left it that the cuſtom might be both ways, as in *Everard* and *Smallrey*, *Mic.* 13 *G.* 2.

That a ſurrender was the *natural* way; and if there was a cuſtom both ways the *preferable* way, as the moſt *natural* the moſt *eaſy* and *unexpenſive*.

King's Bench.

On a ſpecial Verdict.

Sweeping clauſe will not carry eſtates not expreſſed in the premiſſes.

A. being poſſeſſed from his father of an undivided moiety in th county in the county of *Mayo*, and alſo of another undivided moiety in the *King*'s county in the kingdom of *Ireland*; an alſo of other particular eſtates of conſiderable value; makes a *dee* of ſettlement, reciting in the preamble his natural affection to hi *blood*, *family*, and *name*, and that the purpoſe of the deed is to ſettle his *one undivided moiety* (that is his expreſſion) accordingly h does, by a very long conveyance, reciting very *ſpecially indeed* th ſituation, &c. and afterwards *limitation* of the uſes; and then follows a clauſe—" *with all my other eſtates in the kingdom of Ireland*," *without any* limitation of uſes.

Queſtion: Whether eſtates which he had in the kingdom o *Ireland*, beſides theſe moieties paſſed.

Lord *Manſfield*—The queſtion on this deed went on *two* points.

Firſt: Whether the general words would paſs any particular eſtate not before expreſſed.

Second: Admitting thoſe general words ſufficient to paſs an eſtate not before named, yet there being *no limitation* of *uſes*, whether *this eſtate* ſhould not *reſult* to the *grantor*?

V. Analogy between deed and act of parliament in many reſpects in the notes on Wynne's Dialogues on the laws of England.

The queſtion admits very eaſily of the deciſion on either point—but on the firſt, which is moſt difficult, it is to be conſidered that the *preamble* of a *deed*, as of an *act* of *parliament* is a *key* to the *whole*.

Having declared the *conſideration* of blood, &c. as mentioned in the caſe, he proceeds to his intention of ſettling *one* undivided moiety: Now he had *two*; one in the county of *Mayo*, the other in *King's* county.

He then goes with the *utmoſt tautology* to enter into the moſt *minute* and repeated deſcription that could be made; all confined to *this* eſtate which deſcended from his father. He *limits* the *uſes*, and *then* comes, what perhaps was the *blunder* of the *tranſcriber*, but take it at the moſt it is only a *ſweeping clauſe* of *all his other eſtates* in the kingdom of *Ireland*; by which kind of *ſweeping clauſes*, conveyancers often take in every thing relative to what had been *before* recited, and which it was poſſible they might have omitted to enumerate *preciſely*; (and beſides it helps forwards a line,) but they *never* mean to paſs any thing *new*. Now the particular eſtate in queſtion, is ſtated to be of conſiderable value.

Now is it *credible* this would have paſſed by *ſo few general* words, when ſuch an *immenſe detail* was made of the others?

Does it appear in the *preamble*, that any thing was meant to be *ſettled* by the *deed*, but the *undivided moiety only*? Is *this* eſtate to be carried by a ſweeping clauſe when mentioned *no where* elſe? Nor with any *circumſtances* elſewhere to give a *ſhadow* of appearance, that it had *ever once* been *thought of* by way of *paſſing* under the deed.*

Second point.

On the ſecond point, if it could appear theſe words were otherwiſe ſufficient to have paſſed the eſtate in queſtion; what will be the conſequence if *no uſes* have been *limited*. Now, the *not* limiting of any uſe, goes ſtrongly amongſt other grounds to *prov* that there was *no intention* it ſhould paſs; next there having been *n* *ſuch limitation*, the *uſe* not paſſing any where elſe *reſults* to the *grantor*.

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* Clauſula generalis ad ea refertur de quibus ſpecialiter præmiſſum eſt, ut acceſſoria earum vel nonnunquam res ejuſdem generis ſecum ferat; non autem nova et diverſi generis.

Vide Bacon on uſes.

Lord *Mansfield* obſerved farther, that probably the word *ſaid* had been left out, and that it might be "All my other *ſaid* eſtates," with reference to the undivided moiety.

Mr. Juſtice *Aſton* much to the general effect of the chief juſtice. And he ſaid he ſhould be obliged to go over the ſame ground that he did not think there was any doubt.

The judges *Willes* and *Aſhburſt* much to the ſame effect.

Sentence of corporal puniſhment not to be pronounced on a perſon in his abſence.

ON the caſe of a perſon indicted at common law for decoying ſailors on board a ſhip, it being repreſented to the court, tha the crown was inclined to mercy, and the court being deſired t diſcharge him, on ſome corporal puniſhment, he being unable, b reaſon of his poverty, to pay a fine, the court ſaid they could no award corporal puniſhment in *abſentem*.

Conſent of attorney-general where neceſſary, and how.

That the proper way was, the man having been long impriſoned and ſuggeſted to be unable to pay a fine, to obtain a *ſit manumiſſus*. At laſt, by *conſent*, the court ſet a fine of one ſhilling, but obſerved, for the ſake of the *rule*, the *conſent* of the *Attorney-general*, and tha upon *warrant*, was *neceſſary*.

The Attorney-general declaring himſelf authorized to conſent, th court made the rule accordingly.

Compoſition on the Building-Act.

MOTION to compound on payment of coſts.

Mr. Juſtice *Aſton*—You have been told before this kind of compoſition the court by no means approves: And when, out of compaſſion, the court granted the rule, a few days ago, and the onl one hitherto, I ſaid that it would be drawn into *precedent*. But tha he added, was on particular circumſtances, and affidavit of extreme poverty; and that he thought the court ought not to grant th rule.

RULE DISCHARGED.

Declaration in Ejectment.

CASE in *Barnes*, 153, held to be miſreported, and on enquiry into the practice if declaration is in *Hilary*, notice to appear in *Eaſter* term, and plaintiff does nothing in *Eaſter*, he cannot ſign judgment in *Trinity* term.

Abſent Lord *Manſfield*.

Declaration in Ejectment.

MOTION that ſervice of notice in ejectment on the ſervant of an *inſane* perſon might be *good* ſervice. The ſervant intended to be ſerved, it was ſuggeſted, took care of him, and paid the rents.

Notice of declaration not to be delivered to ſervant of inſane, but to committee.

Mr. Juſtice *Aſton*, in the abſence of Lord *Manſfield*, was ſtrongly againſt the rule, and held that the ſervant was *not* authorized to defend the *poſſeſſion* of the lunatic. And when *poſſeſſion* was to be changed, and a lunatic turned out of his eſtate, it would be neceſſary to ſerve a committee, under a commiſſion empowered to take care of his eſtate.

Mr. Juſtice *Aſhburſt*—The ground in common caſes of ſervice of notice on a ſervant being deemed good ſervice, is becauſe it is preſumed to come to the notice of the maſter, which cannot hold in this caſe.*

Common Pleas.

QUARE IMPEDIT.

The Reverend Edward Bernard, Doctor of Divinity, Provoſt of Eton College, with the Fellows of the ſaid College, *againſt* the Biſhop of Wincheſter.

On a Special Verdict.

THIS was on a claim of the advowſon of *Worpleſdon*, to which the crown had preſented.

The verdict ſtates, that King *Charles* the Second was ſeiſed of the advowſon of *Petworth*, *jure coronæ*, and afterwards the other ſucceeding kings of *England*.

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* Ceſſante cauſa ceſſat cauſatum.

That the Duke of *Somerſet* had the living of *Kirby*, and E college the living of *Worpleſdon*.

Saving.

That afterwards, by an act of parliament of King *W.* 3. it enacted, that the living of *Kirby* ſhall be ſettled in the King a Queen, and their ſucceſſors, for ever. That the living of *Worple don* ſhall be in **Eton** college. That the Duke and Ducheſs of S *merſet*, their heirs, &c. ſhall be patrons of *Petworth*, ſaving th right of all other perſons but the King and Queen, the Duke a Ducheſs, and *Eton* college.

Preſentation of Lord Egremont.

It ſtates, that Lord *Egremont* had preſented to the living of *Ki by*, and whether the crown be entitled to the rectory of *Worpleſd* they know not.

And they ſubmit the whole to the judgment of the court, in th uſual manner.

That the act was neceſſary to effect the conveyance.

Serjeant *Burland* argued, for the plaintiffs, that the act was nece ſary to effect this conveyance; the college could not convey witho an act. The act eſtabliſhes the conveyance. The crown was to ta for ever the living that was to be conveyed from the Duke; th college that from the crown; and the Duke that from the college

Lord Egremont's claim.

Lord *Egremont* claims as againſt the crown, inſiſting (under th general ſaving) on a title *paramount*.

Poſſeſſion has been quiet ſeventy years.

That the crown ought not to attack the poſſeſſion of a third becauſe it's own has been diſturbed, without the fault or privity of that third.

The Duke of *Somerſet*, having been miſtaken in his title, an conveying what he had not right to convey, the poſſeſſion of th crown is diſturbed. Is the crown, therefore, to come on the po ſeſſion of the college; and have it's remedy againſt that? The col lege was not bound to take notice of the Duke's title, to which i was a ſtranger, and not privy.

There appears to have been a treaty between the college and th Duke of *Somerſet*. The college were, certainly, to ſee their title but what conſideration the crown was to have, in order to enab the Duke to make this equivalent to the college, was nothing to th college.

That the college had nothing to do with the title the Duke had to convey to the crown.

If the college lawyers had enquired what title the Duke had t the living of *Kirby*, which he undertook to convey to the crown, i is to be apprehended they would have been told it was not their bu ſineſs.

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If it had been the caſe of a common perſon, they would have d their remedy againſt one who had conveyed them a bad title; t not againſt a perſon entirely innocent.

That a common perſon would have remedy againſt the wrongdoer, but not againſt the innocent.

There is no ſaving in the act on account of *eviction* of title; " that if the title ſhould *fail* on one part, it ſhould affect the reſt:" For if is had been the caſe, it would have been expreſſed; and if it had en expreſſed, it would have been *void, ab initio.*

That there is no ſaying in the act on account of eviction. That if there had, it would have been void as to third perſons.

This appears to be contended on the principle of the law of exhange; and ſo if one fails the whole is anſwerable. But I contend ere is no *exchange*, except where the contract or agreement is beween *two parties only*. I don't ſay *two perſons*; for *tenants* in *comon*, or *joint tenants*, be they ever ſo many, may be *one party*. [For ch hath one undivided property, as *one* perſon, though joint tenants ave it by *one* title, and *one* right, and tenants in common by ſeveral tles, or one title and ſeveral rights.

That thir is no exchange; becauſe between more than two parties.

Exchange is founded on this idea on the definition of the very text f *Littleton*, *l.* 1. *ſ.* 62. If there be *two* men, each ſeiſed, and he granteth his land to the other, in *exchange* for land which the ther hath.

That the definition of Littleton confines exchange to two.

Between more parties than two there is no ſuch mutuality or reſprocality. *Bulſtrode*'s caſe, 4 *Co.* 21. the warranty in exchange is nly a ſpecial warranty, and does not extend to recover in value in ny other lands than thoſe given in exchange.

That the reaſon of mutuality confines it. Authority.

If *A.* gives to *B.* *B.* to *C.* and *C.* to *A.* this may be good conderation, but no mutuality: And there is no privity of eſtate, or rivity of contract. It was properly obſerved, that wherever there s *exchange* the word *muſt be uſed*. Vide 9 *E.* 4. *Co.* 51. *Perkins* 53, and *Brooke*, title *Exchange*. Without the word exchange, it s only one thing in conſideration of another, and cannot paſs withut *livery*, and ſo here.

Vide 62, ſ. 12. That between three there may be good conſideration, but no mutuality; ergo, no exchange, and that the word exchange muſt be uſed. ſ. 62.

In exchange the parties have no freehold till executed by entry. *Co. Litt.* 50. 3 *Mod.* 85. *Fitzherbert's Abridgment*, title *Exchange*, *l.* 10. And *E.* 4. 53. If one dies before exchange executed by ntry, the exchange is void, and the heir cannot enter as a purchaſor.

That in exchange the parties have no freehold till executed by entry.

If it had been land, and the donee of the eſtate in exchange had ied without entering, the heir could not have entered.

That in exchange the heir could not have entered, if donee had died.

In

That exchange of reverſion not good without attornment.

In caſe of a reverſion, the ſame law is, that exchange is not good till executed by attornment, which was neceſſary by common law.

That exchange of advowſon not good till induction before the death of one of the parties. That none of theſe could be ſuppoſed neceſſary here to mak the conveyance effectual.

In caſe of a living, in the ſame books, exchange is void, unleſs there be induction before the death of one of the parties. Would it, or can it be ſuppoſed it would be ſo here?

That in exchange eſtates muſt be of equal quality, but not neceſſary here. That as it fails in all the incidents and characteriſtic qualities, it is not an exchange.

To perfect an exchange the eſtate muſt be *equal*. If the legiſlature had known the Duke had an eſtate for life, would it not have been good in this caſe againſt an eſtate in fee? I contend, the conveyance under the act would have been as good as if in fee; but *e contra*, if exchange. It fails, therefore, in every one of the ingredients. It has not the words; an entry is not neceſſary; there are more parties than two, and no need of equality of eſtate.

That it would totally defeat the act to conſider it as exchange.

If this is to be the caſe, that the act is to be conſidered as a deed of exchange, it's whole effect is to ceaſe. The new-erected churches ſink into their original ſtate; the poor not to be maintained by the hamlets; the pariſhes to be deſtroyed; (though the act ſays they are to remain for ever) and all this becauſe Lord *Egremont* claims a paramount title.

That as ſuch it would be void ab initio, not merely voidable, and that all the parties would be to refund all they had received.

Nay more, if it is an exchange, it is void, *ab initio*; as if one gives an eſtate for life, and takes an eſtate in fee; this, by way of *exchange*, is *void*, *ab initio*, and not merely voidable.

The rector may be called upon to refund the 10 *l. per annum* he has received many years back; and all parties, in the ſame manner, to refund what they have received.

Farther that if it were a good exchange, Lord Egremont could not defeat it without regular eviction by an elder title.

Farther, if this be to be conſidered as an exchange, and as a *good exchange*, the *uſurpation* of Lord *Egremont cannot defeat* it. To *defeat* an *exchange* there muſt be an *eviction* by *elder* title; till then it is *only voidable*.

If one of the parties enters by wrong upon the other, the other cannot enter by right upon him, but is put to his aſſize.

But where the eſtate was *defeaſible* at firſt, as exchange by *tenant in tail*, the *iſſue enters*—or *exchange by huſband* having lands *jure uxoris*, the wife enters, then the other may enter, on him *ſo defeating* the exchange. In the caſe of a *ſtranger* entering by *wrong*, the other *cannot* enter upon *him:* And ſo the books. 9 *E.* 3. 21 *Brookes*, pl. *Exchange*, 12, 13. *Perkins*, 219.

What is meant by entering by wrong? If one of the parties, or a ſtranger, after exchange *perfected*, enter; and the title then is to be tried by aſſize.

And if a ſtranger enter by title, he muſt have a *legal* eviction upon his elder title; otherwiſe he will enter as by *wrong*.

If this be the caſe with a common perſon, *a fortiori*, in the crown, whoſe eſtate can hardly, in any caſe, be *evicted* without office found, or matter of *record*. *Roll's Abr.* If an eſtate commence by matter of record it muſt be defeated by matter of record alſo.* Now the King *never* takes but by matter of record.

That ſtill more in the crown, which takes or gives nothing but by record.

Suppoſe the King's title to have been defeated; and that the crown had a right thereupon to reſort to remedy againſt the college, (which, however, would not follow, if the firſt were true, and neither admitted) yet even then the King could not recover againſt the college, without office found. *Stamford, Prerogative*, 55. In all caſes where a ſubject ſhall not have *poſſeſſion* without entry, the King ſhall not have *title* without office, or *other* matter of *record*.

That the King could not recover againſt the college without office.

If the King enters, upon a condition broken, he cannot enter without matter of record.

Caſes.

Nay, if the King's title be found by office to an *incorporeal* hereditament, as an advowſon, he ſhall not be entitled before ſeizure; and party may *traverſe the preſentation*, *without denying* the office.

That here not after office ſhall the crown be entitled without actual ſeizure.

Where a common party would be put to his action, the King will be put to his *ſcire facias*.

Scire facias requiſite.

In this caſe, I repeat, if the crown ſuffers, by entry or uſurpation of Lord *Egremont*, the crown is in the caſe of all common perſons, and muſt ſeek remedy againſt the perſon who did the wrong, and not againſt an innocent perſon.‡

This is an act of parliament; and an act of parliament at the particular requeſt of the parties; and an act which aſſigns to every one a certain diſtinct intereſt, *independent* on the intereſts taken by the others. Either it muſt be repealed by another act of parliament, or

That is an act of parliament giving diſtinct independent intereſts.

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* Naturali æquitati convenit quodlibet eodem jure diſſolvi quo ligatum eſt. Rex neque dat neque accipit niſi per recordum.

‡ Lex ita prærogativam regis admetita eſt ut ne hæreditatem alicujus tollat lædatve.

all the parties are bound by it, and none can reſort to the third fo a recompence for what they received from another, without ſufficien title.

Recapitulation.

Finally, I conclude from all, that this cannot be argued upon th principle of exchange: That if it could, Lord *Egremont* muſt firſ *evict*, and that then the crown would be entitled to preſent, till th title was found againſt it by office: And that if the crown had right to reſort againſt the college, on eviction of the title conveye to them from the Duke of *Somerſet*, it muſt firſt be evicted, an office found, before it can reſort againſt the college for recompenſe

On behalf of the defendant, Mr. Serjeant *Kempe*.

Eſtates of the parties and conveyance.

The learned Serjeant began with ſtating the record; namely, tha the Duke being poſſeſſed under the marriage ſettlement, as tenan for life, of the living of *Kirby*, the crown being ſeiſed of the livin of *Worpleſdon*, *jure coronæ*, and the college, in it's collegiate capa city, being ſeiſed of the living of *Petworth*, the Duke being deſi rous to exchange the living of *Kirby* for that of *Petworth*, as mor commodious to him, and the college being willing to accept in lie of it the living of *Worpleſdon*, which the crown was ready to gran to them, in conſideration of receiving *Kirby* from the Duke: Tha to effectuate theſe purpoſes, an act of parliament was made. Tha the crown thereby took *Kirby* as in exchange for *Worpleſdon*; the col lege *Worpleſdon*, as in exchange for *Petworth*; and the Duke *Pet worth*, as in exchange for *Kirby*.

That the crown gave to the college on conſideration the Duke ſhould convey a fee to the crown.

Queſtion, whether the Duke, having only an eſtate for life to convey, the crown ſhould not reſort to the college.

That the conveyance had been made under the act of parliament on the ſuppoſition that the Duke, inſtead of a life intereſt, had good and abſolute fee to paſs in the advowſon of *Kirby*, and which fee he covenanted to convey to the crown, in conſideration of th crown conveying to the college the living of *Worpleſdon*, and th college to the Duke the living of *Petworth*. That the Earl of *Egre mont* coming in under the general ſaving of the act, by a title para mount to that of the Duke of *Somerſet*, under which the crow claimed, the queſtion now was, whether the crown, being defeate of that title in conſideration of which it conveyed *Worpleſdon* to th college, ſhould not now reſort to it's original title to the living o *Worpleſdon*, againſt the college.

The act neceſſary.

1ſt, *Eton* college could not have attained their object of receivin *Worpleſdon* in exchange for *Petworth*, without the interpoſition o legiſlature.

That this was a ſtrict true exchange.

2dly, When legiſlature did interpoſe, I contend, here was a tru legal technical exchange.

3dly, The legiſlature never meant to alter the nature of an ex-ange; but to leave it as the parties intended, and as the law con-rues it.

That it was the intent of the parties.

Next, I ſhall contend upon the intention of the legiſlature itſelf, at the grant of *Worpleſdon* from the crown to the college muſt be ull and void, unleſs the Duke of *Somerſet* had a good fee to convey the crown in the advowſon of *Kirby*, according to the mutual greement of the parties; unleſs you will ſuppoſe the legiſlature uilty of the greateſt injuſtice in the world.

The intent of the legiſlature.

The laſt matter will be the title of Lord *Egremont*: And the ne-eſſity of a legal eviction, as my Lord *Egremont*'s title is incidentally n queſtion, I ſhall not omit.

The title of Lord Egremont.

That this was an exchange—— I take that mentioned from *Lit-leton* not to be a definition but a *deſcription* of a particular caſe of xchange. He then goes on to another.

Littleton's deſcription of a particular caſe.

There is a definition in *Finch*, p. 103, which has not been ſo aithfully copied as it ought.

“ An *exchange* is a *mutual grant* of *equal intereſts one for other*.”

Definition of exchange, mutual grant of equal intereſts one for other.

The touchſtone of aſſurances does vary a little, “ A mutual grant “ of equal intereſts one for *the* other.” Whether the relative arti-le may make a difference, I will not ſay: But I choſe to take it rom the fountain head.

My brother ſays, there is no *reciprocality*; no *mutual* grant—Let s ſee what the act ſays. “ An act for dividing the chapelries of “ *North Chapel* and *Dugton* from the pariſh of *Petworth*, and erect-“ ing them into new pariſhes, and for ſettling the advowſons and “ rights of patronage of the rectories of *Petworth*, *North Chapel*, “ *Dugton*, *Clewer*, *Farnham*, *Royal*, *Worpleſdon*, *Kirby*, *Overblows* “ and *Catton*, and the vicarage of *Long Horſley**—according to a “ *mutual agreement* between one and the other of the parties.”

Mutuality here from the words. Anno 4 & 5 W. & M. c. 13.

* Note, the title in Ruffhead ends at this mark. *

Thus ſays the title; and of *neceſſity* the agreement is between all *three*; therefore the *reciprocality* is between all *three*, and runs throughout. My brother ſays, the word exchange is neceſſarily re-ſtrained to two; I don't ſee the reaſon. It is a word of *mutuality*. And *Virgil*, of a ſwarm of bees hanging from a tree, ſays they hung *pedibus per mutua nexis*. And in a conveyance of three parts, four parts, and ſo on, the parties *mutually* agree. The college of *Eton* as much ſtipulates and contracts to convey to the Duke of *Somerſet*, as they do to take from the crown; the crown as much contracts

From the meaning and neceſſity of the thing.

Exchange is mutuality, and mutuality may be between more than two.

and ſtipulates to *take* from the Duke, as it does to *convey* to the c lege; and the Duke as much contracts and ſtipulates to conve good and abſolute fee to the crown, as to take from the college.

That here it is mutual agreement expreſsly of all three.

My brother contends, the college is merely *neutral*. How d it appear? Not on the record, in which it is expreſsly contained t all three agree; and from whence it originates ſignifies not a tittle.

That the college is no more innocent than the Duke.

It may be ſaid, that the college of *Eton* is entirely *innocent*. I not that it is more ſo than the Duke of *Somerſet*, who, I am p ſuaded, did not know that he was a mere tenant for life.

All parties in mutual covenants equally bound to look to each other s title.

I never underſtood, where there were three parties, but that the parties were *equally* bound to look to the title of each other.

Intention of parties.

The next thing is of mutual intention. It has never yet been gued but that, in the view of the parties, the contract was mea and underſtood by all as of *equal* intereſts; in the event it turned o otherwiſe: The Duke had only an eſtate for life, expectant on t death of the Ducheſs. If the Duke had been *ſeiſed*, as he ſuppoſ himſelf, of a *fee*, there is no doubt they would have been befo the legiſlature, as having all *equal* intereſts.

The very word exchange not neceſſary; the meaning ſufficient: and this meaning clear in the caſe.

The next, and the *great force* of the argument, reſts on th which I cannot go by. "I muſt ſee the very word exchange." conceive the only meaning is, one thing is to be the conſideratio for the other, and this meaning is abundantly expreſſed. This is t natural meaning of the act in general, ſuppoſing no argument to drawn from the words; which I ſhall conſider by and by. Th crown giving to *Eton*, *Clewer*, *Worpleſdon*, and *Farnham Royal*, a to have *Kirby* from the Duke; and the college *interchangeabl* for it's part, is to convey to the Duke the rectory of *Petworth*.

This, therefore, is an agreement for changing over between the three parties, this could never have been contended, as no exchan as between any of theſe parties and a ſtranger, *a fortiori*, therefo not as between themſelves.

No authority that the word muſt be uſed. No reaſon given.

I did liſten with ſome attention to find whether my brother ha been more fortunate in his reſearches, as to the neceſſity of an ex change being *only* between *two* perſons. I have looked into *Fitz herbert*, *Brooke*, *&c.* and I cannot find even a *dictum* why it cann be between more than *two*. I think it was incumbent to have give a reaſon, as I do not find, nor hear that my brother has found a pr cedent which ſays ſo. Lord *Coke*, in *Bulſtrode*'s caſe, ſays, the *re ciprocal* conſideration of one thing given for another, is the groun of all; and from this is the implied conſideration and warran raiſed.

Thoug

Though the caſe of joint tenants, perhaps, and coparceners, (who, ough they have ſeveral inheritances, have *one* freehold) may not applicable to this caſe, in the caſe of tenants in common both *ehold* and inheritance is *diſtinct*. Now tenants in common may *change* with a third perſon, which goes much, I think, in proof the reaſon and principle. If there be no precedent exactly com-nſurate with the preſent caſe, there is none againſt it.

Tenants in common may exchange, tho' both freehold and inheritance diſtinct; ergo exchange may be between more than two. No caſe againſt it.

I come to the laſt—the " one for other." The touchſtone of ſurance ſays, " the one for *the* other." I agree with my learned other, and will take it from the fountain. It comes then pre-ſely to the caſe.

The *Gothic* word of *excambium* is much relied on. Lord *Coke*, I mit, is clear that no word will ſupply it; I do not admit *Perkins* ſo clear to this; I admit there is a *dictum* of two of the juſtices; admit it is ſo in *Fitzherbert*, and ſo in *Brooke*, the one from the her. But *Perkins* ſays expreſsly, it may be by the word *permuta-o*, &c. or word to the *like* effect.

Proofs that the word is not neceſſary.

I muſt beg my brother's pardon, for ſaying he does not ſtate the d—253, right. It does not ſay, it has been *reſolved*, but only it *ſaid*, an exchange cannot be without the word *excambium*.

Anſwer to caſes cited.

A caſe has been cited by my brother *Burland*, that if the word *xchange* be not inſerted it can only operate as *mutual* grants. Therefore if *A.* by deed indented, give to *B.* an acre of land in ee, and *B.* grant back to *A.* in like manner, this cannot be *good* ithout livery of ſeiſin. But if the conſideration had been ſtated, hat *A.* gives *Black* acre to *B.* in conſideration of *White* acre given o him by *B.* and this appears upon record, then ſays the caſe, of *eceſſity* it ſhould operate as an *exchange*; as if the word *excam-ium* had been inſerted.

Littleton, in his 65 *ſ.* ſaith, it behoveth that the land be *equal*: or if one gives his eſtate in tail for another's eſtate in *fee*, this can-ot be good.

Here *Littleton* doth not make it neceſſary to uſe the word " *ex-change*;" he uſes the word "*for*," to operate as an exchange. To prove that it is not an appropriate word, lands recovered in *warranty* are ſaid to be in *excambio*.

I contend farther, that whatever might be the caſe with reſpect o common perſons, with reſpect to the *legiſlature* a greater latitude will be admitted. And a *fee* will paſs without the word " *heirs*," by act of *parliament*, and in conveyance the legiſlature does not

That in the caſe of the legiſlature a liberal uſe of words is to be intended.

grant and *demiſe*, but *gives* and *ſettles:* It ſpeaks not with the *nicety* and *formality* of a private conveyancer, but with it's own *dignity* and *authority*.

In the caſe of the crown conſtruction ſhall be in favour of the crown.

Another thing, this is the caſe of the crown; and there are a variety of caſes where words will raiſe a condition in favour of the crown, which would not in the caſe of a common perſon.

But I chooſe rather to rely on this being by act of parliament; and I have already ſubmitted humbly to your Lordſhip an act of parliament, framed and executed upon the original intention of the parties.

Intent of legiſlature and parties.

The legiſlature concluded all the parties before them brought an eſtate in *fee*; ſo did the parties: The parties meant an *exchange* of theſe eſtates, as of *equal* intereſts; ſo did the *legiſlature*. No defect was then dreamed of, either by the legiſlature or any of the parties. Whether from oſcitancy, or how, I know not, his grace had not that eſtate of inheritance which the parties and legiſlature ſuppoſed he had. It is not *gueſs*; the parties underſtood a *fee* was to be brought; I think it is *demonſtrable*.

Proofs from the words.

The very dividing is ſtated in the title to be on an agreement between the parties; which, by the language in the outſet, is evidently ſuppoſed, and which runs through the whole. Now the agreement in contemplation could never be that the crown ſhould give an eſtate in fee to the college, in order that the college might give an eſtate in fee to the Duke; and enable him to give his expectant poſſibility in a chattel for his life, after the life of the Ducheſs, to the crown. This cannot be the meaning which is to be intended of any of the parties, and ſtill leſs of the legiſlature.

The conſequence then is, if the crown gave a good title to a fee to the college, they ought to have from the Duke the conſideration for which, in the underſtanding of all the parties, and in the deſign of legiſlature, it was given. If they have not that conſideration, the college have not the title to the advowſon, which, from the nature of the agreement, they took only *conditionally*, if the crown ſhould have an equal eſtate of fee in exchange.

That the conſtruction of the act otherwiſe would argue an injuſtice in legiſlature.

The legiſlature may adopt the agreement of the parties, eſpecially when, from imbecility, they cannot perform themſelves; as in the caſe of *Eton* college. And when they have, the words uſed by legiſlature are to be liberally conſtrued, according to the intent of the parties. Lord *Coke* ſays, *parliamentum*, *teſtamentum*, *arbitramentum*, are thus to be conſtrued. And, in conformity to this rule, I beg leave to obſerve, your Lordſhip will go on the purview of the ſtatute, upon the intent of the parties, and of the legiſlature.

If the legiſlature had underſtood otherwiſe, they would have left the Duke and the college without their aſſiſtance; they would have made an honourable compenſation at leaſt, if they had meant to deveſt the heir.

And they not having relieved any defect, it is to be preſumed there was none then thought to exiſt.

The act is *ancillary* to the agreement. If this defect had been underſtood by parliament, they muſt have given their aid to operate an *injuſtice*; which that they ſhould do is an intendment that never will be made.[*] But I contend, the only view of the legiſlature was to ſerve the agreement, and to paſs a *fee*, as they then ſuppoſed, in *exchange* among *all* the parties; and the agreement failing, the act fails with it: And no part can ſtand, I farther contend, without making the legiſlature work a wrong.

How is it to operate? As an exchange? There is no equality of eſtate: An eſtate for life on one ſide, of inheritance on the other. Therefore the exchange is a *nullity*, and no entry, agreement, acceptance, or acquieſcence, can make it good. *Dyer*, 353.

If, therefore, it ſtood on a common law conveyance, it would be *null*.

Certainly, the legiſlature never meant to give a *tortious* fee, nor to aid any defect, in a caſe of this kind.

But it is contended, this is an act of the legiſlature, and therefore *irreſiſtable*; and *no miſtake* can *ſuperſede* it's operation. But, taking it at the *loweſt*, and lower than perhaps, for argument, it might be taken, it is at leaſt an *involuntary* deception of parliament, committed by a tenant for *life* taking upon himſelf to paſs a *fee*: And where *parliament* aſſiſts individuals in their contracts with one another, it will take care that an *innocent* party ſhall not ſuffer by another party *deceiving* them, whether willingly or *accidentally*, by a falſe ſuggeſtion: And if there be ſuch a deception, the act is void. It is ſure enough a deception will *deſtroy* the effect of a conveyance, ſo it does a grant of *letters patent*: And where the party himſelf is *bound* in *conſcience* to rectify the miſtake, where a deed would have been *void*, where letters patent would have been *cancelled*, it would be ſtrange if an act of legiſlature ſhould *rivet* an injuſtice on the parties.

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[*] Ea conſtructio legis ſemper facienda ut ne cui fiat injuria.
Leges injuſta jubere nunquam præſumuntur—Lex enim injuſta, non eſt lex.
Quod ab initio in ſe caſſum fuit nullâ ratihabitione confirmari poteſt.

This brings me to another conſideration—What is to become
the chapelries? I muſt be underſtood to contend that they nev
have been rectories; that they have been chapelries annexed to th
living.

That the officers will not be diſturbed for antecedent acts.

I do not ſee the weight of the objection, that the officers w
be *indictable* for every act they have done. I think they will
conſidered as officers *de facto*, acting under an authority ſufficient
to protect their acts: Neither will they be *indictable*, nor *puniſhab*
of *treſpaſs*.

As to the *veſting* in the *Duke*, and his heirs, it is not a peculi
veſting, more than to the other parties; and the whole was ſubje
to the *condition* above-mentioned.

Next, the length of time for which poſſeſſion has continued h
been objected. The Duke of *Somerſet* lived till forty-eight; after hi
his next heir; nor could the right be known till the vacancy, an
accruer of Lord *Egremont*'s title.

Recapitulation of the whole.

To conclude this part—It was underſtood by the parties, and b
the legiſlature, that the Duke ſhould convey a *fee*; in conſideratio
of which the crown was to convey an *equal* eſtate to the *college*, an
the college to the *Duke*. It was an agreement, I ſubmit, for a
exchange, in the *true legal* ſenſe: It could not be an *exchange*, unle
equal eſtates paſſed between *all* parties. The eſtates paſſed could n
be *equal*; for the Duke paſſed, and *could only* paſs, an eſtate for *lif*
for which the crown was to give, and the Duke to take, an eſtate i
fee. An exchange, then, of *equal* eſtates was the juſtice and th
intent of the agreement; this or no other could be it's legal operation; to *this* the legiſlature meant to afford their aſſiſtance. And th
agreement of the parties not being *poſſible* to be effected, accordin
to their *intent*, the intent of *parliament*, law and juſtice, the who
fails: And the legiſlature certainly meant the whole, or nothing
ſhould take effect.

Next, as to Lord *Egremont*'s title, though this is incidental, you
Lordſhip will take notice of it, as affecting the title of the crown t
Worpleſdon. He comes as a purchaſor, for a *valuable* conſideration
under the ſettlement. It's left as a doubt, whether Lord *Egremon*
had a *right* to preſent: I think it could not properly be *otherwiſe* o
a *ſpecial* verdict. The jury could not properly find he entered b
title, it being intended to be left to the court.

I don't find, if Lord *Egremont*'s title was *good* before, that m
brother contends much it was *taken away* by the act. Even if the
ha

ad been *no ſaving*, I rely upon it, it would not have been taken way.

What legal eviction then? If not barred by the act, becauſe he as a title paramount to the act, and is not named in the act clearly, is preſentation is *not* by any other means *taken away*.

There can be no title in the crown.

But it is found upon record the crown did preſent. I ſhall con-end this can operate no more, if there had been a thouſand, than a *ollation*. Vide 302 *Salkeld*, *Hobart*. 6 *Co*. 29. *Green*'s caſe. *Vaughan*, 4.

As to the neceſſity of office found in general, it it is true that the rown takes by record, and ſhall be deveſted by record: But by act f law the crown may be deveſted.* Where the crown has a remainder, and the particular eſtate is evicted, the remainder is evic-ed alſo. Where the eſtate of the crown depends on a condition, he condition diſcharged, the crown has loſt it's eſtate, *without office*, hough *veſted* before.

Tuſton *againſt* Biſhop of Litchfield and Coventry and others.

It appears by the books, when the crown preſents by a *rong* title, though it has a *right*, as *jure coronæ*, when it's real title was by lapſe, ſuch preſentation is *merely void*; *a fortiori*, therefore, where there is *no* title at all. And *uſurpation* of title ſhall not be intended of the *crown*; but rather the preſentation ſhall be as if it had *never* been made; not *voidable*, but *void*.

I hope, on the whole, your Lordſhip will conſider this as an intended ſtipulation, by way of exchange, that the legiſlature adopted it as ſuch; that as an exchange it might have been good at common law, if the Duke had *really* conveyed what he was underſtood to convey, and took upon himſelf to convey; that however, he not having done, nor having been able, by the nature of his eſtate, to do this, there is *no exchange*, there being *no equality*; that therefore the agreement fails, and being a *mutual entire* agreement, muſt fail in the whole if in part; and that the act, being meant only to give it aid, if it had been in it's nature ſupportable, fails with it—and that the crown has not been *premature* in preſenting, though without any office—and that it's original right ſhall not be taken away without conſideration—that it is too much to ſay, the crown ſhall be driven to a recompenſe againſt I don't know who. And that, therefore, the court will concur in thinking the crown is in it's original ſtate.

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* Melior et fortior eſt diſpoſitio legis quam diſpoſitio hominis.

Mr. Serjeant *Burland*, in replication—My brother ſays, that wh
I quoted as a *definition*, from *Littleton*, of the word exchange,
not a *definition*, but only an *inſtance*; and to this purpoſe cites a pa
ſage out of *Finch*. I do not ſee the diſtinction between *Littleton*
idea of an exchange and that of *Finch*; and that in the touchſton
I think, does not vary. There is no hint that I can find in any
the books of an exchange between more than two.

It would be very extraordinary if no notice had been taken. Lo
Coke, in a chapter or two after, ſpeaks of the difference and agre
ment between partition and exchange. And where *Littl ton* ſai
partition may be between *three*, he never ſays a word of exchang
poſſible between three. "One for other," in ſenſe, and proprie
of language, muſt be the ſame as "one for the other," to mak
any thing of it. One for other I apprehend to be bad *Engliſh*;
pour auter I apprehend to be bad *French*: But the relative muſt
underſtood in both.

The crown is nominally a party, but *ſubſtantially* the parties a
the Duke and the college. With the crown the college made
agreement, unleſs it be an agreement to *receive*.

I contend ſtill, that nothing will paſs by way of exchange, if t
word *exchange* be not uſed; unleſs by livery and ſeiſin: The opera
tion of this word, therefore, is purely to avoid the neceſſity of l
very and ſeiſin.

Put a common perſon in the place of the crown. A writ
right of advowſon brought by Lord *Egremont*, *who* was the party
vouch? The college could not vouch—Who is to vouch? T
Duke of *Somerſet* and his heirs; not a third perſon. *What* are th
to recover in value? What was given by the Duke. The living
Worpleſdon was *not* given by the Duke.

Tenants in common all together but one party.

It is ſaid, *tenants* in *common* may *exchange*, and that this is t
moſt *ſimilar* caſe—I am glad it is. They make but one party, [
curia aſſenſit] and if they paſs an eſtate in common, they take ba
an *equal* eſtate in *common*, as tenant for life, and he in remainde
take back eſtates for life, and in remainder.

My brother admits the authorities in *Fitzherbert*, *Coke*, and
the books, about the neceſſity of uſing the word; but he ſays *Pe*
kins does not require the word *excambium*, but ſays *permutatio* m
be uſed, or any other word *equivalent* to exchange; that is, if the
be any other word in *Latin equivalent* to *excambium*, if there be a
word in *Engliſh* equivalent to exchange, if there be an equivale
word to which the law annexes the ſame idea, it will be uſed

properly: Suppoſing it were *permutation*, for inſtance. But giving one land *for* another does not operate as an *exchange*. My brother would contend, that *for* is the operative word; for *Littleton* has uſed "*one for another*," and muſt mean exchange. It means it *there*, becauſe he was ſpeaking of exchange in the very *place*; but if he had been ſpeaking on another ſubject, would one for other of itſelf have implied an exchange? No; for then an exchange would be if an eſtate for life paſſed for a fee; which, however, my brother admits cannot be an exchange, becauſe it is not an *equal* eſtate. Equality of eſtate is one requiſite, mutuality is another; and a *mutual* exchange muſt be between *two* parties *only*.

That one land for another does not of itſelf operate as exchange.

Mutuality between two parties only.

The conſtruction of the act, he contends, muſt agree with the intention of the parties; this I admit. The *preamble* declares the intention of the act is the dividing of the chapelries, and ſettling of the advowſons. [*Curia*, the dividing the chapelries is not in the preamble. This is a miſtake of my brother *Kempe*'s] As to ſettling the advowſons, then that would not be anſwered by annihilating the act of parliament.

The intention of the parties not to be anſwered by deſtroying the effect of the act.

As for remedy, I apprehend it will not be contended the Duke of *Somerſet*'s heirs are not in a condition to make amends: And the college would be greatly injured if, for the bad title conveyed from the Duke to the crown, to which the college were ſtrangers, amends were to be required from them.

Lord Chief Juſtice *De Grey*—I find, on conferring, *we* agree in opinion, and will give no farther trouble, though we are always glad to hear you. It may be neceſſary to ſtate the outlines of the caſe.

Judgment.

Settlement—Eſtate to the Ducheſs for life; to himſelf for life; *remainder* to ſons, in tail male; remainder to daughters, in tail.

The Duke of *Somerſet* had the rectory of *Petworth within* his manor, and was very deſirous to get it; the crown engages to give, not for it's own intereſt, a very commodious living to the college, for which the college was to convey *Petworth* to the Duke, and the Duke to convey in value to the crown. The college could not convey without the act.

The Duke had a farther object, of uniting three pariſhes; which the other parties had nothing to do with.

The legiſlature, therefore, make a conveyance by *veſting* and ſettling, with a ſaving to rights other than of the parties.

The Earl of *Egremont* has his claim under the daughters, by virtue of the marriage ſettlement.

The crown preſents upon the diſturbance of Lord *Egremont*, th matter having reſted from 1692 to 1760.

Queſtion, Whether the *old right* of the crown ſtands to the liv ing of *Worpleſdon*, againſt the college?

The right of Lord *Egremont*, under the ſaving, ſtands as if th act had never been made.

In the conſtruction of private acts of parliament we are to go o principles of common law, applied to the ſubject. If the intentio therefore, was to make a partition, or *exchange*, the *incidents* wi follow *accordingly*.

It has been ſaid it is a queſtion, whether the legiſlature makin this conveyance was not to follow the conſequences of *exchange* i it's *equality*—one of which, it is ſaid, is, that an eviction by o party ſhall defeat the whole, *ab initio*.

Exchange is a *poſſeſſory* act, and by common law might paſs b parol, and without livery and ſeiſin; and though this is altered b the ſtatute of frauds, yet it's *other* incidents *remain*.

It's not neceſſary to ſay whether the *word* exchange be *neceſſar*

It will be proper to ſay what is the nature of exchange. It ha been ſaid, if tenant in tail exchange with tenant in fee, and the hei enter, the *whole* is defeated.

It is not neceſſary equal eſtates ſhould be in the perſons, but th eſtates *given* muſt be *equal*.

It is obſervable that no *arbitrary* effect is derived from exchange but the effect muſt be derived from the *remedies*.

Re-entry is one; which is *entire* and *indiviſible*, and therefore i a party is evicted, though only of a life eſtate, yet he muſt enter o the *whole*.

This condition of re-entry is not given to a *ſtranger*; for it pro ceeds on *privity*—but *againſt* a ſtranger.

Suppoſe now the ſecond party impleaded; he vouches the other vouchee *fails*; recovery in value *pro tanto* only: And that ſpecificall of the lands only.

I

It is *lineal* only, and not collateral: For proceeding on *operation* f *law*, the law will not introduce the *hard* effects of *collateral* war-antry.

Another remarkable circumſtance is this, that though acts for eſ-ablishing exchange are very frequent, yet they who made this act ave made no mention of *exchange*.

Take it a little farther—And, to conſider it diſtinctly, let us take t more ſummarily, as on lands.

Acts of a third party not prejudicial.

A. in conſideration of a grant from *B.* infeoffes *C.* with warranty; *C.* infeoffs *B.* with warranty; *B.* is impleaded by *C.* He cannot ouch *A.* who takes nothing.

So here *B.* the Duke of *Somerſet*, cannot vouch *A* the college, ecauſe *A* never had the lands; therefore the loſs remains at home; herefore the loſs is yet where it ſhould be: The loſs remains where he bad title was. If *B.* has no aſſets the loſs remains with *C.* where elſe ſhould it remain?

In a more familiar caſe—ſuppoſe ſecurity for an eſtate made partly y money paid by feoffee, and partly by ſecurity given by a *ſtranger.* Security of the *ſtranger* failing will not *evict* the eſtate of the *hird* perſon. Suppoſe a conveyance to uſes, (without extraordinary covenants) each conveys for his own, the caſe would be the ſame; and a miſtake in the title of one of the parties, unleſs particularly guarded againſt, would not affect a *third* perſon.

How does this affect the caſe; and how agree with it? Exactly *mutato nomine.*

This is the more *reaſonable*, conſidering the circumſtances of the caſe. It muſt have originated from the Duke of *Somerſet*: The crown had *no* intereſt.

The family ſettlement was in the hands of the Duke. Suppoſe it had been before the parliament, they would have taken *Kirby*, and ſettled *Petworth* in the ſame manner.

Maxim.

The maxim, *res inter alios acta alteri nocere non debet*, is of weight and application to this caſe.

Inconveniency of croſs warranty.

The inconvenience which would ariſe from *croſs* warranty, as well as croſs remainders, is a reaſon why we ſhould not labour to introduce it.

It is ſaid, this is not the ſame as an eſtate in lands, an advowſ lying in *grant*. It may be neceſſary to have a different *mode* conveyance, but the *rights* are the *ſame*. And ſo I think the *cro* being a *party* makes *no* difference, except in the *mode* of proceedin

What does the *ſaving* do? It makes an eſtate *defeaſible*, whi otherwiſe would have been *indefeaſible*: And Lord *Egremont* tak his benefit.

I do not take it as material in what manner they proceeded: F a legal *eviction* on *record* would *not* have affected the *college*.

Therefore JUDGMENT, I think, ought to be for the PLAI TIFF.

The WHOLE COURT of the ſame opinion.

5 *February*. B. R.

Bail.

NOTICE of bail in *Hatton-ſtreet*, *Middleſex*, held ſufficie without naming any pariſh, though the name is chang within theſe two years from *Hatton-garden* to *Hatton-ſtreet*.

Conſtables.

IN the caſe of conſtables choſen at the leet, to ſerve for the hu dred, I have found the farther arguments and opinion of t court.

Mr. *Dunning* obſerved, that when the queſtion was laſt befo the court, it had been ſo fully argued, that there could be no ne of enlargement.

He obſerved, that liability to being tythingman could not of i ſelf be any exemption from being conſtable: For that it is only t *ſame* juriſdiction, in different extents.

And here the larger diſtrict comprizes the whole of the othe ſo that the difficulty would be no more for the conjunction of tw offices in one perſon than from the ſingle office of conſtable to executed by that perſon.

Th

That he is liable to do ſuit at a court-leet *one* day in the year, is ot ſurely reaſon of *general* exemption: And beſides it is ſtated, that y cuſtom the reſiants of the manor have been *accuſtomed* to do ſuit t the court of hundred. We don't come upon him for non-per-ormance of ſuit, but for performance of the duty of conſtable; to which by the ſtating upon the verdict he is bound.

The exemption will extend to *all* the reſiants of the leet, if the laim ſet up be allowed; the leets may run *throughout* the *hundred*, nd then this exemption applying thus to *each* leet in *particular*, and o *all* in *general*, there will be *none* to *ſerve*.

Lord *Mansfield*—Mr. *Dunning*, we would ſpare you and ſhould e glad to know where the doubt is.

Contended on the other ſide, that the defendant owes no ſervice o any other leet but that in which he is reſiant; and that he does ot owe to the hundred to ſerve as conſtable.

That the nature of a court and the reaſons of eſtabliſhing it, were for exemption from ſervice out of the leet; that as a leet was originally deſigned to form a common ſociety of perſons anſwerable for one another, antiently a perſon reſiant of the leet, might not leave it without licence from the leet.

That generally a perſon of an *inferior* leet ſhould not be liable to do ſervice to a *ſuperior*.

Coke, on *magna charta* and the ſtatute of *Marlebridge*, that the chief pledge was to produce the reſt; and the pledge who was ſo called *chief* was the *conſtable*.

That there had been *great* variety of opinion, or contrariety between my Lord *Coke* and *Hale*; that the latter was of opinion, the conſtable of the hundred was of ancient inſtitution, antecedent to any ſtatute in being; that Lord *Coke* thought it came in by the ſtatute: That perhaps the difference might be reaſonably ſolved by ſaying, that the high conſtable was of new inſtitution, and not antiently diſtinguiſhed from the conſtable of the hundred, for that antiently there were no leets but of the hundred.

That the antient power of puniſhing was only by diſtreſs when preſent, or by amercement when abſent.

That *Keble* 11 *Mod.* and *Freeman* were books of *no* authority. [Lord *Mansfield* would not allow this of the laſt, and ſaid Mr. *Hopkins*, a friend of his, would frequently inſiſt *Freeman*'s Reports to be be the beſt of all; and that he himſelf thought *very many* of the *well* reported.]

Upon this it was obſerved, that as to *Keble* and 11 *Mod.* the were not only defective in authority, but that in *Keble*, Lord *Ha* had been made to *contradict* himſelf, and in 11 *Mod.* to talk ver unintelligibly of a diſtinction between borough and upland towns and that admitting *Freeman* of authority, it is very ſtrange he ſhoul be the *only* Reporter of authority who had ſupported the opinion and ſo many of the beſt authorities to the contrary.

As to the finding, that the jury was to find *facts* and *not evidenc of facts.*

It does not appear any *unwilling* perſon was ever forced to com in and ſerve—the mere uſe of the word cuſtom will not ſatisfy th court, they meant to find a cuſtom in the ſenſe of law.

But that they only take it in the common acceptance of the wor in the country, and in common parlance; that in another part the had uſed the words *immemorial uſage*, which here they would not.

Judgment.

Lord *Mansfield*—If I take it right, there is *no* authority or dic tum that the reſiants of a leet within hundred are excuſed; much le that it is good not by cuſtom that they ſhould ſerve. On the othe hand there is the expreſs authority of the caſe of *Key* reported b *two* books: And if *both* the *worſt reporters* that *ever reported*, yet they ſtate a very long caſe the ſame way in the ſenſible part, an alſo in the leſs material; would you have me think two *bad* repor ters can *concur* and *agree*, in ſaying the choice of conſtables is *article* of the leet, and therefore *no* excuſe that they were withi *another* leet; can I believe they would concur in ſaying *this*, if ſuch thing had ever been ſaid. 11 *Mod* goes ſo far as to ſay tha the choice of conſtables is no article of the leet; and that if th general exemption failed, yet preſcription would make it good.

As to the cuſtom I think they have found ſufficiently on th words; and no man can doubt the meaning. I ſhould be ſorry if I could help it, to ſend them back to try it all over agai They find there hath been a court held *from time whereof the memor of man runneth not to the contrary:* And that by *ancient cuſtom*, con ſtables were *eligible* and *elected* in the court leet of the ſaid manor from amongſt the *reſiants* of the manor to *ſerve* as *conſtables* for th *hundred*: They find an *ancient cuſtom* in a court of *immemorial ex iſtence*; the cuſtom is to be intended as coeval with its exiſtence- if not the jury would have found otherwiſe and ſtated it's *begi ning.*

Mr. Juſtice *Aſton* obſerved, that a man might not be liable to do ervice at two leets in the ſame reſpects, and therefore not to find *ledges* at two leets: But that the conſtable was an article according o *Hale*, *not* within the leet. Vide *Shower*'s caſes, *Betteſworth*.

Mr. Juſtice *Willes* ſaid, that it appeared from the caſe in *Keble*, hat the exemption which might be claimed only operated *pro anto*.

New Trial.

ACTION upon a policy of inſurance from *Grenada* to *London*, with the uſual covenants, and that the ſhip ſhould ſail to nd from *Grenada*.

The ſhip ſailed, and on his return the captain ſtopped at *Antigua*, eaning as it appeared on the ſtate of the evidence to go home, nd not to continue captain the whole voyage. The ſhip laid at nchor off *Antigua* third-ſix hours.

The ſhip on return was loſt.

Queſtion: Whether this a deviation? One ſide Lord *Mansfield* bſerved, contended that every *innocent* delay was a deviation; the ther that a deviation muſt be a crime; his Lordſhip reported his irections to the jury. I told them the inſured was obliged to find a aptain or perſon to take the conduct of the veſſel; that it appeared his delay was owing to the ſtaying for a mate. At that time in my wn mind I was inclined to think it a deviation, *but* I left it to the ury, they found it *no* deviation.

Mr. *Wallace*—That the captain, in doubt of the abilities of the maſter, endeavoured to get a mate. That the ſhip was becalmed off *Dominica*; that the captain endeavoured in the mean while to get a mate; but failing went to *Antigua* directly. That there was *no ex-preſs* deviation, for that it is not pretended the ſhip was out of the ine of her voyage, no time ſpent in trade for himſelf. Nothing more was done than what proper care required to prevent the loſs of he veſſel; and nothing more than ſetting the maſter on ſhore and eturning *directly*. As to *accidental* circumſtances of what ſtorms he ight either have fallen into or avoided by this *neceſſary* and *prudent* tep, that this will not vary the caſe.

Mr. *Dunning*—That there was nothing to vary the caſe as before he jury and that to them it was very properly left; that the delay was or the intereſt of the perſons concerned in bringing this action.

Mr. *Manſfield*—For the new trial.

That the evidence went ſufficiently in proof of a deviation; tha whether by going fifty or an hundred leagues out of the way, o by loitering in the harbour, it would be all alike.

That the ground was altered from what had been taken upon th trial; for then it had been attempted to juſtify the deviation, bu now to prove there was none.

As to neceſſity, which was the ground on which the captain him ſelf had reſted, he might have got a mate at *Grenada*; that it was n excuſe that the men in the veſſel were not capable, for proper me ought to have been provided when they ſet from the port of depar ture. He concluded with obſerving, that he thought the jury wer men not much acquainted with queſtions of that ſort; to which Mr *Wallace* anſwered that one of them was a captain of a ſhip himſelf.

Mr. *Bearcroſt*—That it was a very plain caſe for a new trial, an that if any thing better had been poſſible to have been ſaid, Mr *Wallace* would never have endeavoured to excuſe the deviation, b ſaying the captain carried on no trade for himſelf.

Lord *Manſfield*—The inclination of my mind is much the ſam as on ſumming up; but I doubt on ſuch a caſe when the jury hav found the verdict whether there ſhould be a new trial. They ſ ſail from *Grenada*, no neceſſity for delay, if the maſter had bee ſick, or one of the men died, they might have delayed 'twice a long without any ground of complaint from the delay.

There has been *no fraud*, no intention of carrying on trade fo themſelves, this does not indeed alter the point of law; but ma alter the reaſons for granting a new trial after verdict.

Mr. Juſtice *Aſton* ſeemed to think it was not much material whe they changed the maſter in their voyage, or when they ſet out And it might be more expeditious at *Antigua*. And as to illneſs h ſays he is well at preſent, but by the ſubſequent letter he ſays he ha been ill.

Mr. Juſtice *Willes*—If there had been no finding I ſhould hav been at a loſs how to direct; they certainly were bound to ſet ou with proper men. It may be dangerous however to conſtrue thirty ſix hours delay fatal, for it would be very hard for commerce tha ſuch a delay, for which there was a good reaſon for the ſecurity o the ſhip, ſhould be held of ſuch prejudice to the captain: Thoug perhaps he would have done better if he had avoided the delay, b

providin

providing all things neceſſary before he ſet out; there would be no drawing the line, a delay of five hours might be conſtrued a deviation.

If the court think it neceſſary to take time I ſhall be very ready; but I ſee at preſent no cauſe for ſetting aſide the verdict.

Mr. Juſtice *Aſhhurſt* held that the captain appeared, however it might be, evidently to have done his beſt for the ſafety of the veſſel; and that after it had been tried by a jury of *merchants* * he ſhould be very unwilling to unſettle.

Of deviation where it ſhall charge and where not, vide Parker's Laws of Shipping and Inſurance 320—322. 350—365.

COURT DISCHARGED the RULE.

Pew.

Fiſke and Rout.

On a Motion for a Prohibition.

PRESCRIPTION laid that he and *his anceſtors*, and thoſe *whoſe eſtate he hath*, have *immemorially held* and *enjoyed* a certain *pew*.

Contended, that it is not good without ſhewing that he *repaired*, or his anceſtors *&c.*

Mr. Juſtice *Aſton*—It certainly needs not be *alledged* on a declaration; nor farther needs it be *proved*. The pew might never *want* repairs: Or be it as it will, if a man and his anceſtors have held time which *no man* can *remember* to the *contrary*, (for I don't ſee that it is neceſſary to preſcribe from *R.* 1.) ſurely this is ſufficient to ſupport a claim of *right*; the repairs are *only evidence*.

Lord *Mansfield*—Yet it is not barely by *ſetting* in it; for that may be by *leave* from the ordinary.

Mr. Juſtice *Aſton*—Being *immemorially* uſed with the houſe is ground of *preſcription*, or *building* the pew may be found a title.

Mr. Juſtice *Aſhhurſt*—Perhaps as a claim againſt *common right* it may be as in the caſe of toll, which requires *conſideration* to be alledged

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* From the reign of R. the firſt has been the commencement of legal memory ever ſince 3 E. 1. ch. 39. Vide 2 Commentar. and continues to be ſo now, tho' from the latter period to the preſent year 1776, is a ſpace of 501 years.

ledged and *proved*. Mr. Juſtice *Aſton* I ſhould be very glad to he the caſe argued.

Accordingly it ſtood over.

Mr. Juſtice *Aſton* ſaid, that if they meant to argue the caſe ſhould be glad to hear it argued when the court was full, and know if they had any caſes.

Mr. *Wallace* mentioned the caſe of *Kenrick* and *Taylor*, *Wilſon* Rep. 326. where Lord Chief Juſtice *Lee* ſaid it was not neceſſa to ſhew repairs againſt a wrong doer; becauſe it was a *rule* of *la* that you need not ſhew any cauſe againſt a *wrong doer*, but of th *ordinary* it is otherwiſe; for of *common right* he has the diſpoſal ſeats, and repairs muſt be proved, for you cannot *ouſt* the *ordina* without ſhewing *conſideration*.

Mr. Juſtice *Aſton*—As to the ayle the *ordinary* hath it not *common* right but it will be intended the perſon who preſcribes w the builder of the ayle; and if otherwiſe it muſt be alledged. An where the allegation is *neceſſary*, and not laid in the declaration, will not be preſumed; and accordingly where the *ſcienter* was n laid in an action for driving a mad bull—*bad*, though there was verdict for the plaintiff. And ſo the caſe in *Salk*. *Buxendin* an *Sharpe*, and a caſe in *Lutwyche*; and therefore where repairs a *neceſſary*, they cannot be intended without being alledged.

2 Salk. 662.

Mr. *Wallace*—That in the caſe of toll it was *neceſſary* to *prove con ſideration*, but not *neceſſary* to *alledge conſideration*.

Vide Wood's Inſt. B. 1. ch. 7. p. 89.

And alſo the diſtinction concerning the ſituation of a pew. 2 *Inſ* 306. 12 *Co*.

Mr. Juſtice *Aſhhurſt*—That they might *amend* their ſuggeſtio before the prohibition iſſued.

Mr. *Cooper*—That preſcription for a ſeat in the church was in it ſelf of a temporal nature, and generally went along with the free hold; and therefore that the ſuit was in it's original, *coram non ju dice*. Caſe of *Loyd*.

Mr. *Wallace*—That where there is a diſturbance in a pew, the ordinary has a juriſdiction.

Mr. *Cowper*—Where it is firſt brought here the court will dra the trial to the *common law*; though where they commenced in th

ordinary

ordinary's court, there might be no *original* defect of juriſdiction.[*]

Bonſey *v.* Lee.

Rule to *ſhew cauſe* why *ſuggeſtion* ſhould *not* be *amended* thereupon. Vide *Siderſin* 89 and 361. *Barrow* againſt *Keene*. 3 *Leving* 72. was alſo cited which is to this effect. A prohibition was moved, ſuggeſting *that* the trial of letters patents and all grants of the crown is at *common law*, and not in the *eccleſiaſtical* court; and that the defendant had libelled againſt him for *tythes* upon title to the rectory by *letters patent* from the crown more antient. Reſolved, that the *foundation* of the ſuit being the tort in *withdrawing* the *tythes*, and the title only an *incident*, the eccleſiaſtical court ſhall try the *temporal* matter ſo long as they proceed as the temporal law would in ſuch caſe; but when they proceed in a temporal matter otherwiſe than the temporal law would, they are then to be prohibited; but not before. In *Lev.* are cited 1 *R.* 3, 4. 12 *Rep.* 66. 3 *Cro.* 466.[†] 3 *Cro.* 788. *Baker* and *Rogers*.

Neſton *v.* Sharpe 3 Croke, here is what is commonly called 1 Cro. or better, Cro. Eliz.

Note, The next caſe in *Levinz*, *Aſhley* and *Feckleton*, ſeems very full to the principal caſe of *Fiſke* and *Rout*.

Action on the caſe—Plaintiff declares that he is ſeiſed of a meſſuage; and that *he* and *all thoſe que eſtate* he hath, have *time out of mind* had *all* the *ſeats*, and the ſole ſepulture in the church; and that the defendant diſturbed him.

After verdict for the plaintiff, in arreſt of judgment, that he had ſhewn no conſideration, in not preſcribing to repair. To which it was ſaid, that againſt a ſtranger, or wrong-doer, no title or conſideration is neceſſary to be ſhewn; but *where he claims againſt the ordinary himſelf* he ought to ſhew ſome *cauſe*, as *building*, *repairing*: And ſo upon that report it ſeems to have been reſolved, *per curiam unanimiter*.

In the caſe above of the indictment for driving over a child, I have found the court were of opinion that the ſecond was ſufficiently laid, and had evidence to ſupport it.

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[*] Acceſſorium non ducit ſed ſequitur ſuum principale

Omne magis dignum trahit ad ſe minus dignum.

Eæ demum veræ leges exiſtimandæ quibus *omnes* aſſenſerint.

[†] Quod prius in tempore potius in jure.

Quælibet evidentia juris ſive facti plus aut minus valet ſecundum ejus contra quod intenditur firmitatem.

Mr. *Dunning*—That there was diſagreement between the evidence, whether the horſes were trotting or walking; and that to ſupport the ſecond count, there was not evidence that any of th king's ſubjects were frightened or endangered. That the whole miſfortune aroſe from placing the child in a very imprudent ſituation, and leaving it there, in a public ſtreet. That the unhappy event was, in ſome degree, imputable to the drayman; but much more to thoſe who placed the child there. And that the object of the action was, probably, the *deodand*, by the particular finding concerning th wheel.

That the indictment charges *misfortune* or *miſchance*, which ar known otherwiſe than as *crimes* by the laws of this country.

That if the evidence proves any thing, it proves ſomething no charged in the indictment; and therefore, at any rate, too much o nothing. And therefore that the verdict is *void*.

Lord *Mansfield*—It was very properly left to the jury upon th *ſecond* count. Here is a dray in the ſtreets of *London*, going a faſte pace than a trot; (it is ſaid in the evidence between a trot and a gallop) it appears he was twenty yards behind the horſes: The peopl were terrified, and cried out.

It is ſaid on the other ſide, he was at the horſe's heads; but thi is contrary evidence very proper to be left to the jury. And it weigh very much with me that he ran away immediately, driving as fa as he could.

Award.

ON a diſpute about a church-rate, one party offered a ſubmi ſion: But it was contended, that the matter being originall of eccleſiaſtical cognizance, they ſhould go for a definitive ſentenc into that court.

Lord *Mansfield*—Is not a ſubmiſſion ſtronger than any ſentence If they will not take a ſubmiſſion offered, with payment of fu coſts, I will conſider of it this time twelvemonth.

New Trial.

ASSIGNEES bring an action of money had and received to recover debts due to a bankrupt. Evidence of commi ſion ſued; docket; petition to the lord chancellor, in the uſual form bond to prove the bankruptcy. All theſe proceedings by the defendant.

A falſe or colluſive act ſhall conclude againſt the parties to the fraud, though all the world beſides may be permitted to controvert it.

After all this a letter to the bankrupt was written by the defendant, who had done all theſe acts, offering to *ſtop* proceedings under the commiſſion, on payment of 500*l.*

The money paid, and defendant contended againſt the aſſignees, that *no* act of bankruptcy was committed, till a time ſubſequent to this payment.

Lord *Mansfield*, in making his report, ſaid he was of opinion, on the trial, that it *lay not* in the mouth of the defendant to ſay this, when he had gone through ſo many proceedings, extremely *unjuſt* and *oppreſſive.* in any other view.

Whatever it might be with reſpect to other perſons,[*] I thought it concluſive againſt the defendant, and I left it to the jury, whether they believed theſe acts of the defendant fraudulent: And then if they did, that as to the point of *law*, my opinion was, the aſſignees needed not to ſhew *any other* evidence, ſo far as defendant was *concerned*; and eſpecially as the docket was not withdrawn on the ground of new information, but on the expreſs terms of the money being paid. This I thought was as ſtrong as any thing could be.

Mr. *Davenport*—When I ſtate them claiming as aſſignees, they ought to prove the bankruptcy not by the weakneſs of the defendant, but by their own ſtrength.[‡]

That if the queſtion had ſtood on the particular time of bankruptcy, the defendant's acknowledgment muſt have concluded him; but not if there was no act of bankruptcy then, or even now.

That the petition and bond, &c. were no *proofs* of bankruptcy.

If there had been any doubt, whether act of bankruptcy, or not, and the defendant had colluſively aſſiſted in attempting to make colour of it as one, then I admit, on the force of the caſe, that the aſſignees might have come againſt the defendant.

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[*] Res inter alios acta alteri nocere non debet.
Allegans turpitudinem ſuam non eſt audiendus.
Allegans contraria non eſt audiendus.
Nemo lucrabitur de injuria ſua propria.

[‡] Quilibet debet cauſam tenere ſua vi; non imbecillitate adverſarii.

Lord *Manſfield*—The whole argument ſeems to turn in a circl that aſſignees, when they bring an action, muſt *ſhew* an act of bank ruptcy committed; and then it begs—that there is no proof.

The propriety of proof muſt depend on the party *concerned*; H declarations are *evidence* againſt himſelf; his writings are *evidenc* much more his *oath* is *evidence*.

The doctrine is ſimilar of fines and voluntary conveyances.

And ſo in a caſe which frequently occurs, ſuppoſe a creditor agree with a trader, that one ſhall come and aſk, and he ſhall den himſelf, and they take out the commiſſion by colluſion. The *par ties* ſhall never be permitted to ſay it was by conſent and *covin*; th bankrupt ſhall never be permitted to ſay ſo: And this was decide in a *capital* caſe,* that the bankrupt ſhall not come a year afterward and plead it was *agreed* between them, and therefore *no real* bank ruptcy. But yet this ſhould not be a bankruptcy, as againſt a *bon fide* creditor. And there is not a more *beneficial* point in the law.

The *extortion* is *ſufficient evidence* againſt himſelf. He *ſhall n* ſay, "I acted very *cruelly*, and with great extortion; but there " *nothing* in my *admiſſion* of the bankruptcy, which was *void* an " *falſe*."

If he could have ſhewn any thing that he was *innocent*; had with drawn the docket, on better information, and had taken no advan tage; ſo that he could have denied the bankruptcy, conſiſtent wit innocence, it would have been ſufficient.

And thus the *evidence* was left, not as *concluſive*, indeed, but ver fit to be left to the jury; and very properly they found, I think.

Mr. Juſtice *Aſton*, much to the ſame effect; relying principall on withdrawing the docket, on payment.

Evidence.

WITH reſpect to the caſe of *Jones* and *Randall*, I have a lit tle memorandum what was ſaid by Lord *Manſfield*, on th firſt motion; which, becauſe it more fully opens the nature of th evidence of a MINUTE-BOOK of the HOUSE of LORDS, I inſe here.

Lord *Manſfield*—There is *no* difference between the JOURNA and MINUTES: For there is not a *word added* upon the journal And it is not a *looſe* minute-book, but a regular ſolemn judgmen s read the ſecond day, and then *every word* of it is entered upon the book.

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* Perrot's.

There has been a doubt, whether the minutes of the HOUSE of COMMONS could be admitted, becauſe *not* a *court* of *record:* But hey being evidence of *public* buſineſs, that objection has *now ceaſed.* Are the books of the Houſe of Lords to be carried all round the kingdom, when *every perſon* has a *right* to reſort to them? How great would be the inconvenience!

As to previous proceedings, the whole point turned here, whether here had been an appeal and decree: So that there was no neceſſity o give the previous proceedings in evidence.

Return.

THIS cauſe was argued on *Friday* the 23d of *November*, in *Michaelmas* term 1773, and now came on for judgment on the ninth of *February* 1774.

On an action of treſpaſs and falſe impriſonment, defendant pleaded a ſpecial juſtification, on a capias out of the ſheriff's court, on a cauſe before that court, having juriſdiction of the ſame, in which the defendant levied his plaint, whereupon proceedings were had, which the caſe ſet forth, and a capias iſſued from the ſaid court, commanding him to take the body of the defendant, *&c.*

To this plea there was a ſpecial demurrer, containing three exceptions.

1ſt, That the *cauſe of action* was not ſet forth; only that he levied his plaint.

2dly, That they have not ſhewn the *return* made to the writ.

3dly, That they have not ſhewn the *day* when returnable.

And firſt it was contended, from 2 *Roll's Abr.* that if the officer who takes the defendant does not return the writ he is a *treſpaſſor*, *ab initio.*

Moor, 57.

To a pluries replevin you muſt return.

2dly, When you juſtify, you muſt ſhew the cauſe of action.

2 *Lutwyche*, 295.

3dly, Return muſt have a *certain* day.

2 *Danv. Cro. Ja.* 323.

So that generally, though a court be held from three weeks t three weeks, yet the return muſt not be at the next court; but th writ muſt have a certain day of return.

Lutw. 914, 925.

3 *Levinz.* 194.

On the other ſide, that where the arreſt was on *meſne* proceſs, ſeemed the rule was as Mr. *Buller* had ſtated, but not on proceſs o *execution*.

That in the caſe in *Salkeld*, the principal determination was no what Mr. *Buller* ſpeaks—that the caſe is alſo reported, Lord *Raymond*, 462, and 4 *Mod.* 396, and expreſsly held to be ſo diſtinguiſhed. On *meſne proceſs*, as *capias ad reſpondendum*, greater nicet is required.

So in *Fuller's* caſe, in the reports, 5 *Co.* 90, *ſcire facias*, the execution was held to be good, without return of the writ.

So if a man be taken on a *capias ad ſatisfaciendum*, the executio is good, though the writ be not returned; for the plaintiff has th effect of his ſuit, without any thing farther to be done.

Nor are theſe authorities confined to diſputes between the partie and where the ſheriff is party. *Lane.* Caſe of *Doiley* and *Jolif* againſt the ſheriff, ſame diſtinction taken between *meſne* proceſs an execution.

That in point of *practice*, no return is ever made to a writ of execution; unleſs it be for a *ſpecial* purpoſe, to proceed againſt th plaintiff.

As to ſtating the proceſs, 1 *Lev.* 81. it appears, that if the cou proceed *erroneouſly*, action ſhall not lie againſt the officer for fal impriſonment.

That nothing but prolixity in pleading and encreaſe of expenc would follow.

As to objection that the precept ſtated is *void*, this is no foundation for an action of falſe impriſonment.

Mr. *Buller,* in reply—That all the caſes he had cited, except the ſt, were ſtated to be on execution: And that even the firſt ap- eared to be ſo.

Between the parties the diſtinction holds, but not with the ſhe- ff's *officer,* who muſt purſue the authority, or elſe by the caſes be- re cited, 2d *Danv. Cro. Eliz.* and *Cro. Ja.* he is a treſpaſſor, *ab itio* With reſpect to the parties who cannot return, they may ail themſelves of the writ, though it be not returned;* but other- iſe of the ſheriff, whoſe *duty* it is to return. Caſe 4 *Co.* 1. which eaks of *liberate,* does not affect the argument; for *liberate* is not n *alternative* proceſs. The caſe in 5 *Co.* is between the parties.

How far the caſe of *Gwyn* and *Poole* may go, I will not ſay; but think it cannot extend ſo far as to make it material to this point to nquire.

In the ſecond caſe it was only the officer who juſtified, and the fficer is not cognizant of the action, but the ſheriff and his deputy s.

As to the third, Mr. *Chambers* ſays it's only *error.* This is all I ould have it; for this is confeſſedly enough to ground the action gainſt the parties; for then the impriſonment is without authority. The officer, indeed, is not cognizant to it, as ſaid before; but if ad for one, it is bad for both.

Lord *Mansfield*—I will look into the caſes: It tends to ſettle a oint of practice. I own I wiſh the defendant may be right; I on't believe, in *fact,* they ever return execution.

Afterwards, on the ninth of *February* 1774, as above, his Lordſhip delivered the opinion of the court to this effect:

After ſtating the caſe, and points of law made on the demurrer, *ut ſupra.*

As to the firſt objection, that the cauſe of action is not ſet forth, only that he levied his plaint. You will ſee in *Lily*'s Practical Regiſter what the nature of a *plaint* is in this inferior court. It's in the nature of a *ſhort* declaration.

Lev. quandam querelam ſuam infra juriſdictionem.

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* Lex neminem cogit ad impoſſibilia.

2 *Perk.* 914. The defendant ſets forth much in this manner,

Formerly the courts were much ſtricter with reſpect to the in rior courts; nor would preſume any thing as to the proceſs.

2 *Lev.* 71.

Raym. 81,

But 2d *Mod.* 95. The plaintiff alledges generally, without ſayi what kind of treſpaſs.

As to the point of not ſhewing he became indebted *within* t juriſdiction, the ſame liberality is to be uſed. If the defendant rea ly and fairly had meant to avail himſelf, he would have *pleaded* the juriſdiction;* or it would have been bad by error. The ſan objection was overruled in Common Pleas, 31 *G.* 2.

The ſecond objection, of *no* return, depends upon the diſtincti between a *meſne* proceſs and execution.

5 *Co.* 90. *Bowe*'s caſe; and the reaſon, that nothing more is be done.

The caſe cited by Mr. *Buller*, as a principal ground, it appear was on *meſne* proceſs.

The caſe in *Salk.* 429, was in *replevin.*

5 *Mod.* The court ſaid, " the officer is *not puniſhable* if he do not return the writ.

The third objection, that the return day is not ſhewn forth. A the caſes are either upon *meſne* proceſs, *imparlance*, or *jury proceſs*

It is admitted to be good when the appearance is enforced, an party brought into court.

2 *Cr.* 48. 2 *Cro.* 284.

The reaſon why the day ſhould be ſhewn certainly on *meſne* pr ceſs went upon a *different* ground.

The laſt caſe, 2 *Mod.* 59. aſſault brought, and falſe impriſonmen

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* Qui non negat ubi debeat et poſſit, fatetur.

As to the exception of *ad proximam curiam*, inſtead of ſetting orth the day when returnable, the chief juſtice held it bad, for want f this, but the three other juſtices held it good. And how can he return be certain when the judgment is *de die in diem?*

We are all three of opinion that the **PLEA** was *good*, and **JUDGMENT** ought to be for the **DEFENDANT**.

Affidavit.

Not to be defamatory.

LORD *Manſfield* obſerved, that the affidavits of the court were never to be made ſubſervient to *defamation*, and complained as he had done on a late occaſion) of the practice.

Sheriff.

IT ſeems, on enquiry into the practice, the ſheriff cannot have poundage till the goods are *ſold*.

Privilege.

A Man *arreſted* in attending the *proceſs* of the court. He proceeded as for a contempt againſt the party arreſting, and rought his action for *falſe impriſonment*, His attorney made up he action, on the defendant's releaſe of the debt, and payment of oſts. An attachment was moved againſt the attorney, for having ompromized the matter without the conſent of his principal.

Court ſaid he was very right; for that the arreſt was *good*, though fficer puniſhable for the contempt.

Inſolvent Act.

DEBT due before the diſcharge, but *ſolvendum in futuro* at a day ſubſequent to the diſcharge. Queſtion, whether the ebtor was diſcharged from this debt? Mr. *Lucas* contended he was. ord *Manſfield*, on the ſudden ſtating of the caſe, ſeemed to doubt; nd Mr. Juſtice *Aſton* ſaid it would be proper to look into the caſes. And *now* Lord *Manſfield* told Mr. *Lucas*, that he (Mr. *Lucas*) was ery right; and Lord *Manſfield* ſaid he had been reminded by his clerk, after the riſing of the court, that he had made twenty orde accordingly. It is *when* the money becomes *due*, not *when payab* When the *contract* is upon a *contingency*, it differs.

Jenkins and *Jennings*, *Bur*. 82.

2 *Str*. 249.

This was on the 5 *G*. 3.

Mr. Juſtice *Aſton* obſerved, the words on the 12 G. 3. were muc ſtronger, contracted, accrued, cauſed or growing due.

Pariſh Clerk.

Mandamus.

ON a motion for a *mandamus* to reſtore to the office of pari clerk, the *mandamus* was refuſed, the party applying not ha ing ſhewn any title, in the opinion of the court; and it appear there was a *plenarty* of office; for the office was full of the *princ pal:* And the court would not grant a *mandamus* to admit a *deputy*

Admitted, that an action for *fees* would lie. And the appointme of a pariſh clerk may be good, it ſeems, without *writing*.

Habeas Corpus.

IN return to this writ a married lady was brought into court wh appeared to have been extremely ill uſed by her huſband; demanded her to be reſtored to him.

It appeared ſhe had been taken out of his hands by her own co ſent, and for her ſecurity.

On her appearance in obedience to the writ the court ſaid, if ſ had any thing to ſay they would hear her and would take care, was neceſſary, not to let her huſband take her as ſhe was coming ck. And that a tipſtaff was in ſuch inſtances ſent: But if ſhe ould ſay nothing the court would not.

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* Thus a legacy to *A*. payable when he arrives at twenty-one, ſhall be paid the repreſentatives of *A*. if he dies before. But " I give to *A*. when he arri " at twenty-one years," is a lapſed legacy, if he die before. And the differen is, whether the time is annexed to the ſubſtance of the grant, or the grant ab lute, and the time annexed to the payment. A truſt to executors until *A*. arri at twenty-one. And when he has attained that age then to *A*. is a preſent legac and if *A*. dies under age, will go over to his children.

Vide *Goſs* v. *Nelſon*, *Bur*. p. 226. And vide the caſe, p. 228.

Lord *Mansfield* ſaid, That the court would *never* grant farther an that a perſon appearing to legal proceſs, ſhould not be in a *orſe* condition than before.*

The court does not ſay but that he ſhall anſwer if he takes her; e court ſometimes will ſay that they will not interpoſe when he kes her in court; and in the caſe of an infant the court has deared ſo.

V. Bur. 606.

Mr. *Dunning* was contending, that unleſs where there was a ſearation or marriage denied, the court would never interpoſe to proct a femmes return.

On the other hand it was ſaid, I think, by Lord *Mansfield*, that his interpoſition for the ſafety of the wife's perſon, was what the ourt would always exert on due application and proper grounds.

The lady ſaid ſhe ſhould be glad to be miſtreſs of her own *free* erſon; as ſhe had been ſeparated from her huſband for ten years.

Lord *Mansfield*—Madam, It is not in my power to divorce you, ut I give notice the court will never ſuffer the huſband to take her n return, when brought up by an *habeas corpus*.

The protection of party and witneſs attending proceſs, eundo, manendo, redeundo.

Notice being given to the court that he waited at a neighbouring offee-houſe, to ſeize her on her return, the court ſent a tipſtaff o bring him into court, and on his appearing there Lord *Mansfield* aid to him, I thought you had been better acquainted with the *ractice* of the court, (for he was an attorney) than to think you ight ſeize your wife on her return from the court: We had exreſly declared, and the court will never permit it, unleſs they ſay ſo. ven to a witneſs (much more to a party) the court gives full proection, going, continuing in the court, and returning.

If you had dared to ſeize her until her return *home*, (by which I ean wherever ſhe pleaſes to go) I ſhould certainly have committed ou. The court will never endure it's proceſs ſhould be made ſubervient to this, againſt a perſon who comes up in obedience to it.

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* Actus legis nemini facit injuriam.

Society

Society of Grays Inn.

ON a diſpute whether rateable or not which ſtood for trial— Motion to ſtay proceeding on a ſuggeſtion of a petition i parliament, without any other ſuggeſtion of any thing that migh make it wrong to proceed, or that effectual juſtice could not be don in the cauſe.

Lord *Mansfield*—The ſtrongeſt reaſon that could be for their goin on to trial, that they have applied to parliament; the parliamen will then ſee what is the legal right.

Rioters.

IN caſe of ſome perſons convicted of a riot at *Dover*, of a violent and dangerous kind, and who were brought up to receiv the judgment of the court. Mr. Juſtice *Aſton* pronounced the *judgment* which was, that the court on their conviction ſet a *fine* of 100*l* each on two of them; as to the other two (for there were four) o affidavit of their having a family and not being worth 5*l.* after payment of their debts; the court adjudged, that they be *impriſone* for *ſix months* each.

Motion: That the priſoners might be carried down to *Dover* an impriſoned there, inſtead of being in the priſon of this court: Thu much argued that it was in the power of the court.

Lord *Mansfield* ſaid, he had no doubt of the *power* of the cour over *all* the *priſons* in the *kingdom*;* but would not interpoſe withou precedent in ſuch a caſe; for that it was a very great riot, and man's life had been endangered.

Rule to ſhew Cauſe.

Rule of practice.

WHEN you move for a rule to ſhew cauſe on the day before the end of the term, the rule muſt be drawn ſpecially for the *laſt* day.

Place.

PLACE of waiter to the commiſſioners of the cuſtoms is no a place to take away the benefit of the inſolvent act.

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* So in a caſe in Sir James Burrow, all the priſons in England are the priſons o this court.

Eaſter Term,

14 Geo. 3. 1774. K. B.

Note, Serjeant Burland *ſucceeded this term, as one of the puiſne* Barons *of the* Exchequer, *in the room of the late learned and much regretted* Judge, Baron Adams, *who died of a fever on the circuit.*

Certificate.

CERTIFICATE in diſcharge of a bankrupt pending the ſuit operates in the nature of a releaſe.

Award.

TIME elapſed, which is limited by the ſtatute for proceeding againſt an award; they applied for an attachment for non-performance of the award.

To this motion it was ſuggeſted in diſcharge of the attachment, that they were at iſſue in the court of exchequer, on the validity of the award.

Lord *Mansfield*—We have *nothing* to do with *that*—the ſtatute binds the court of exchequer as well as this court.

New Trial.

MOTION for a new trial.—Verdict had been found for plaintiff, on evidence of a converſation by one of the witneſſes. Affidavits were offered of an *alibi* at the time of the converſation alledged ſworn to, namely, that the perſon who ſwore was then in another place.

Court granted a rule to ſtay proceedings till the trial of the indictment, with liberty to produce a copy of the indictment in evidence, in caſe the witneſs ſhould be convicted.

Femme Covert.

BY a rule of court money had been directed to be paid into th hands of a father for the benefit of his daughter, who was femme covert.

The father refuſed on apprehenſion of an action. And now th court was moved, that the money may therefore be directed to b paid into the hands of another perſon, named on behalf of th femme.

The court ſaid this in the caſe of a femme covert was *analogou* to levying a fine, or examining before chancery, and therefore *ſh* *muſt appear in perſon.*

Juſtification.

NO juſtification of bail will ſignify any thing after the ſheri has been ruled.

Iſſue.

YOU cannot ſign judgment for non-payment for the iſſue, until demand and refuſal.

ON a motion to ſet aſide an order founded on the 9th of G. for building *Black-Friars-Bridge*.

There is a compulſory power to buy in lands for the better building of the bridge, in caſe no agreement can be made; this power i given to the mayor, aldermen, and commonalty in common council aſſembled.

It appeared upon the caſe ſtated, that the complainant again this order was a mortgagee and ſo ſtated in the order.

2d. That the order imports to have been made by the *mayor* *commonalty* and *citizens*.

3d. That the meſne proceedings before adjudication are all in the *paſt* tenſe and not in the preſent: And upon theſe ſeveral grounds it was contended the order ought to be quaſhed; there was another point that they have ſtated the order to be in purſuance of the act, without ſaying in what manner.

And firſt, That by ſtating the complainant to be mortgagee they have not ſhewn a caſe upon their own ſtating, whereby it appears they were impowered.

2d. That there is no ſuch corporation as the *mayor*, *commonalty*, and *citizens* of *London* deſcribed in the act.

3d. That the paſt tenſe inſtead of the preſent was againſt precedent, and all the reaſon of the law which ſuppoſes all matters before it be done *eo inſtanti.*

4th. That acting under a *ſpecial* authority they ſhould have ſhewn *ſpecially* how they had purſued that authority.

To this it was anſwered, firſt—that mortgagee was within the general words of the act "all perſons ſeized of any *eſtate* or *intereſt*." Now a mortgagee has a *legal eſtate* in the *term* and an *equitable intereſt* in *ſecurity*.

2d. That the act does not mean that it ſhall be neceſſary to give the corporation of *London* a *new* corporate name; and that the *proper* corporate name is mayor, commonalty and citizens.

That it would defeat the end of the act, if you were obliged to buy in *many* acres, in order to come at a few.

As to not uſing the *preſent* tenſe in proceedings, that this would have been abſurd ſpeaking of things not done untill after.

In anſwer to this it was replied, that all acts which compel a man to part with his property in a ſummary way muſt ever be purſued *ſtrictly*, and the *power* be *fully* ſet forth whereon ſuch an authority is given, *derogatory* to the common law. As in order of juſtices for removal of a pauper, it muſt be ſtated complaint was made by churchwardens, that it may be ſeen the queſtion came properly before the court. And if the removal be on the ſtatute of King *W.* it muſt be ſtated, that the pauper was likely to become chargeable, that it may appear they had juſt ground laid before them of removal.

“ In *purſuance* of the act,” without ſtating in what manner, only telling the court that, in their conceptions, they have done the act directs; which might equally be an anſwer in any caſe, ho ever erroneous, illegal, or oppreſſive. The court is to judge wh ther they have proceeded according to the act, not on the credit ſuch a general declaration of themſelves in their own caſe, but ſeeing, on legal evidence, how they have acted. And this evidenc if they were in the right, they ought to have laid before the cour

As to *præſtitit*, it is certainly wrong; for the law preſumes it's proceedings to be on record the *inſtant* the facts ariſe. A there are caſes which prove that ſuch a variance is *fatal*, Lord R *mond*, 1376. Conviction upon ſwearing, 6 & 7 King *W.* quaſhe becauſe ſaid that a witneſs *præſtitit ſacramentum*, and not *præſta*

Lord *Mansfield*—This is a very nice objection; becauſe when t man has taken his oath, though it be ſuppoſed taken down at t inſtant, it muſt be *præſtitit*. *

Rejoinder—That it is ſufficient if it appears that the perſons empowered by the act are the perſons treating and applying.

This is not an authority veſted as a judicial or legiſlative powe but it is a *capacity* given and veſted in the conſtituent parts, (whi for this purpoſe are the mayor, aldermen, and common council) order to *enlarge* their powers of *purchaſing* lands.

Now if there is an authority to *A.* to purchaſe the lands of his treating with *B.* is a ſufficient proof of his purſuance of the a thority.

The city of *London* could not be a purchaſor, under other deſcrip tion than as mayor, aldermen, and common council, or common alty.

Now if the name of commonalty goes farther than common coun cil, and includes others as well as themſelves, this ſurpluſage wi not certainly vitiate, if it be proved the parties empowered have concurred in the contract.

That mortgagee, *in* or *out* of *poſſeſſion*, is within the words “*eſta* “ or *intereſt*;” and if you muſt tender the *whole* mortgage mone (which was contended) you may be obliged to tender 20,000*l.* fo a purchaſe of the value of 10*l.* That as to this the proviſion *optional* in the *corporation*, and *either* way *compulſory* on the party.

* This ſeems to be the proper uſe of the preteritum perfectum; which ſome therefore, I think, have not improperly called the preteritum præſens, as ſtanding on an indiviſible point between the paſt and the preſent.

As to the objection of *præſtitit*, inſtead of *præſtat*, it may have s place; but in things which are done after ſome other, it cannot improper to uſe a tenſe expreſſive of their being ſo after done.

Lord *Manſfield*—In this caſe the *præteritum*, in propriety of lan- age, *neceſſarily implies* the *preſent*.

Mr. *Dunning* was very large on the abſurdity of ſuppoſing the t to mean the corporation muſt purchaſe *all* to come at *ſome*; the blic accommodation be delayed or defeated, if they do not take eat eſtates upon their hands to obtain a trifle; and a number of neceſſary houſes be bought, to come at a few that they *do want*.

As to the objection to the tenſe, that perhaps there never was time when *falſe* grammar was *required*; but there were times in hich the diſtinction between *falſe* and *true* grammar was not ſo *ll* underſtood as at preſent: And there were *always* times in which eople took notes without knowing what they took, or underſtand- g what they heard; and thus converted into nonſenſe that which to thoſe who hear and underſtand, extremely good ſenſe. Nor d grammar, if it was falſe, ever make void a deed or record.* or was all the nicety of ſpecial pleading required in perſons who d not undertake nor pretend, nor ought to be obliged, to under- and thoſe dangerous and miſchievous ſubtleties.

As to the objection to the deſcription, it amounts to no more an only too many applied—you have all applied: A few of that l would have done; a part would have done; but the whole can- ot. Beſides, the objection was not made at the quarter ſeſſions, hen *competent* to have been made, if there was any thing in it.

Serjeant *Glynn* was againſt the order, Mr. *Bearcroft* and Mr. *unning* in ſupport of it.

Lord *Manſfield*—What was meant to be gained, ſuppoſing the arty complaining ſhould ſucceed?

The anſwer was, the great inconvenience of the diminution of the alue of the lands remaining, whereas the jury determined only on he value of ſo many ſquare feet of ground. This was objected, as conſiderable defect in the valuation.

Lord *Manſfield*—I wiſh you could have proceeded to ſettle it ſome ther way; for it may be very troubleſome to them though we

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* Mala grammatica non vitiat chartam.

ſhould happen to be for them, and they prevail in point of form
(unleſs, indeed, we ſhould think that there is no power to force th
mortgagee to ſell the land) but what if we conceive there was
way, and a power of coming at the lands, and that they had bee
only irregular in point of *form*.

Terms were propoſed by Mr. *Bearcroft*.

Mr. *Cox* ſaid, he hoped he ſhould render a reference *unneceſſar*
by ſhewing the plainneſs of the caſe, in which he had more inform
ation than the other gentlemen.

The commiſſioners are to be treated with; the mayor, alderme
and commonalty, in common council aſſembled, are the commi
ſioners to treat; but when the *conveyance* is to be made, this is to b
done by the city in general, " the *mayor*, *commonalty*, and *citizens*;
otherwiſe they would ſoon petition againſt the act, if they were
be called on whenever a conveyance was to be made.

As to mortgagee, it ſuppoſes a caſe where the mortgage may co
ver the *whole* premiſſes; therefore if there is a mortgagee not in po
ſeſſion, the object is, that the city may come into the title witho
the trouble of a *forecloſure* in Chancery.

Mr. *Alleyne*—Without going *out* of the record, the application
to be made in the very ſtile ſtated in the record.

The court ſaid, however, that whatever there might be in the re
cord, there was not a word in the order. *Sed v. infra.*

Lord *Mansfield*—I was very anxious to have it ſettled in an ami
cable manner; for the *victory* will be very hurtful to the party: An
if the jury are to aſſeſs in a litigious manner, they will ſet a loo
value on the lands.

Mr. *Dunning* objected to the propoſal of purchaſing the *who*
term; but ſaid that there could be no objection, he thought, on th
part of the city, to make an enquiry.

Powers derogatory to private property, though by act of one's own repreſentatives, to be very ſtrictly conſtrued, and not enlarged by intendment. Quod nota.

Lord *Mansfield*—I had inclined to a reference. This is a *ſpeci*
authority given by an act of parliament, to make a man part wi
his lands *againſt* his *will*, and muſt therefore be *ſtrictly* purſued
And it muſt appear on the face of the proceedings that it has bee
ſo purſued.

The firſt objection is, that the mayor, aldermen, and common
alty, are not the perſons empowered, but the mayor, citizens, an
commonalty, which are two diſtinct things; one a ſecular body, fo

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ticular purpoſes, the other a corporation at large. Can *we* look o the conſtitution of *London*, and ſay, that the mayor, citizens, d commonalty have no authority; or that it is made by the *mayor*, *dermen*, and *commonalty*, in common council aſſembled, when up- the face of the record it appears otherwiſe?

That the variance of ſtile is material, and cannot be cured by evidence of the conſtitution of the city, or by conjecture.

There is another objection, which has not been taken notice of, hich is, that it does not appear that *Croke*, the mortgagee out of oſſeſſion, had *notice*. They ſtate, indeed, that he had *due* notice; t there are ſeveral ſpecific circumſtances required by the act, hich ought to have been ſtated, in purſuance of a *ſpecial* authority.

Acts under a ſpecial authority ſhould be ſpecially ſet forth.

Now as to the *merits*—(for the others are objections againſt the rm)—Now *Croke*, it ſeems, is tenant out of poſſeſſion, for a two four year's term, I think, remaining.

The mortgagee is not compellable to account with the mortgagor, d there is a great difference, as to affecting the intereſts of the rm. Then what ſays the act? The mortgagee out of poſſeſſion ight ſign to any body; he ſhall ſign to the perſons empowered. es; but under certain regulations.

I deſire to be underſtood as not deciding that the city may not roceed againſt mortgagee and mortgagor, for their *reſpective* inte- eſts. With mortgagee, as for an apportionment of the term eſtate; ith mortgagor for the reverſion; but then they muſt *both* be *par- ies:* And they don't come in under *particular* proviſions, but the *eneral* words.

Mortgagee and mortgagor ought both to be made parties, when their reſpective intereſts are concerned.

Mr. Juſtice *Aſton* ſaid, that in this caſe the appearance of the ortgagor would not cure.

He concurred with Lord *Mansfield*, in ſaying that the judgment as very unſatisfactory, in ſaying the money ſhould be paid to *Croke*, r ſome *other* perſon *intereſted*; whereas the act of parliament leaves *othing* at large, but puts them to an award; and calls in all the arties intereſted, in order to have the value *fairly* and *clearly* aſſeſſed.

Wright *againſt* Holford.

Caſe out of Chancery for Certificate.

THIS aroſe upon a clauſe in the will of Mrs. *Holford*, wife of *Peter Holford*, made by virtue of powers reſerved to her under the ſettlement.

The deviſe was, all her moieties to her huſband, for life, witho impeachment of waſte; limitation of a term of 500 years, as proviſion for younger ſons; then limitation in tail male to the eld ſon, with remainder to the uſe of ALL and EVERY the DAUGHTER and DAUGHTERS of her by her huſband, the aforeſaid *Pet Holford*, to be begotten, and to the heirs of HER and THEIR bodies, lawfully begotten; ſuch daughters, if more than one, to tak as tenants in common, and not as joint-tenants; remainder to h own right heirs, in fee. She died without revoking her will, leaving a ſon by him, and two daughters, *Conſtantia* and *Maria*, and ſon by a former huſband, who was the plaintiff. And queſtio whether the plaintiff, as heir at law, became intitled, upon the deat of *Conſtantia* without iſſue, under the diſpoſition of the will; whether the ſhare went to the other ſiſter, by ſurvivorſhip?

On the ſide of the heir at law—I ſhall lay this down as a princ ple in law, as old as *H.* 7. and down to the preſent times, that t heir at law is not to be *diſinherited* but by expreſs deviſe, or neceſſarily *implied*, and that probable conjecture will not do. I ſhall ci *Gardiner* and *Sheldon*, and *Williams* and *Brown*, which, I think, a preciſely the ſame with this, and have only a colour of diſtinctio at beſt, and that a very ſlight one I ſhall take notice of the caſe *Holmes*, and ſhall make a few curſory obſervations on the long ſtri of caſes which have ariſen.

Certainty is the grand object of the law, on the conſtruction of will, as it is moſt highly expedient that diſpoſitions of eſtates ſhou be preſerved. How is this to be attained, but by the principle have inſiſted on? If the heir be diſinherited by any thing leſs, inſte of a *certain* deviſe, (or what I take to be the ſame, a neceſſary implication) if any the ſtrongeſt *probability* be admitted to ſupply th uncertainty and conjecture will be introduced; whereas no obſcurit can be, if *neceſſary* implication be required: For neceſſity is an *extreme*, and all *extremes* are very *eaſily defined*.

Lord *Mansfield* ſaid, no one doubted the caſe of *Gardiner* an *Sheldon*; they only explained the meaning of *neceſſary* implicatio Lord *Hardwicke*, in the caſe of *Corrington* and *Hellier*, never doubte the caſe of *Gardiner* and *Sheldon*, but only ſhewed what a *neceſſar* implication was. There a man had made an eſtate to *A.* for ninety nine years, with the ſubſequent limitations over. No man can ſa it was *neceſſary* he ſhould mean to ſay, "*if he ſo long live.*" H might have given a man an eſtate for ninety-nine years; but und all the *circumſtances*, the court judged the intent to be *certain*, *neceſſarily implied*. A *neceſſary* implication is, where the intent upo the whole is *clear*, ſo as to ſatisfy the conſcience of the court, an tha

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hat no *reaſonable* man who hears it can *doubt*, and muſt be upon he will itſelf, and not from any thing out of the will.

Serjeant *Hill* proceeded with the caſe of *Cumber* and *Hill*, ſt. 64.

Williams and *Brown*.

There is not only a want of *neceſſary* implication, but the *croſs* emainder, ſuppoſing it well and *ſufficiently* conveyed by the expreſ-ions, and *not* too *uncertain* and indefinite to take effect, cannot *here* e ſupported, becauſe *bad* in law in it's origin, even admitting the eſtatrix had *intended croſs* remainders, and *well* and *ſufficiently* ex-reſſed her intention, according to law: For in this caſe it being to *aughter* or *daughters*, lawfully to be begotten, there might have een *more* than *two*, and no *croſs* remainder ſhould be between *more* han *two*, and therefore thus the ſupport would be not good of the roſs remainders contended for; which, if they could be proved to ave been intended, muſt be proved in ſuch a manner as, it is hum-ly ſubmitted to your Lordſhip, will not *agree* with law.

The words are almoſt the ſame as in *Cumber* and *Hill*; and what as been obſerved of croſs remainders, as a reaſon of their being *ſo* eſtrained and circumſcribed as I am contending before your Lord-hip they *have* been, by *ancient* and ſucceſſive adjudications, is, that hey create *great confuſion*.

How far this reaſon holds, or what other, it is not my buſineſs to nſiſt on. However, it is enough for me if I prove, that in *fact* a ule of law, *ſettled* by *deciſions*, there is *now* ſtanding, which, whether for the reaſon hinted to above, or for whatever other, will ot *allow croſs* remainders but by *neceſſary* implication; nor between *ore* than *two*. And a deviſe muſt be good in it's *original* creation, r it cannot be eſtabliſhed by *ſubſequent* event. If this be admitted, hen in the caſe before us, the huſband being living at the making of he will, there might have been *more* than two. But if there be a ifference, it muſt ariſe on the word *reſpective*; which is ſuperflu-us: For it muſt be *underſtood* where the perſons are of the *ſame* x. And *Bacon* very ingeniouſly, as he does every thing, explains he maxim, *expreſſio eorum quæ tacite inſunt nihil operatur*.

Maxim.

[The caſe of *Cumber* was cited from the bench, which was to is grandſon, *Hendon*, and his granddaughter, and the heirs of their odies reſpectively]

Serjeant *Hill* continued—In the caſe of *Doe*, on the demiſe of *Burville*, againſt *Burville*, if the implication had not been raiſed, he eſtate would have gone *from* and not *to* the heir at law: And this is conſonant to the principles I ſet out with, and ſo *Holmes* and *Meynell*.

Ejectment—" I deviſe *all* my lands in *A.* to my two daughters, " *E.* and *A. M.* and the *heirs* of their body, equally to be divided " among them. And if they die without iſſue, then *all* to my ne- " phew, *F. M.* with divers remainders over."

This, being the caſe of a teſtator, ſhould be governed by *inten- tion*, as in 13 *H.* 7. a deviſe to a ſon and *heir*, *after* the *death* o his *wife*, makes an eſtate to the *wife*, for her *life*. This is proo of what intention he was ſpeaking of not being a *probable* conjec ture, but *neceſſary* implication, in the ſtricteſt ſenſe; an eſtate to th heir, after the death of the wife: He was not then to have it *before* nor was any third perſon to take; and *therefore* the wiſe muſt: An the diſpoſition was ſuch in that caſe, it was ſaid, as *prudence* and reaſo would *juſtify*.—And what was the caſe? It was in favour of the poſ terity of the teſtator, who could not otherwiſe take but by ſuch impli cation, and the whole was intended, and altogether. And the wor *all*, he ſaid, ſhewed plainly the *whole* was intended to paſs togethe

Dyer, 330.

Cro. Ja. 365. *Gilbert* and *Witten*.

The caſe Lord Chief Juſtice *Pemberton* denied is, where the was an *expreſs* croſs remainder limited, and therefore cannot be la

Lord *Hardwicke*, 1 *Atkins*, 215. Deviſe to two daughters, a the *heirs* of their bodies; and, for default of ſuch iſſue, remainder ove That this was to be underſtood *reſpective* iſſue. If the word h been, " If they die without iſſue, heirs of their or *either* of th " bodies," this I admit, in any caſe, would create a *croſs* remaind But here the words are " *All and every* the daughter and daught " of the body of the ſaid *Peter Holford*, on the body of me, *Co* " *ſtantia Holford*, begotten."

No more than a deviſe to the *daughters*, and the heirs of th body or bodies, to take as *tenants* in *common*, if more than *one*. T is no more than to the *heirs* of their bodies; and, on failure of iſ of any *one* of them, *then* the ſhare goes to the heir. But it is ſ if there had been *one* only, ſhe ſhould have taken *all*: Why *more* ſhould not the *ſhares* go by *ſurvivorſhip*?

I anſwer—the intent is not ſo ſtrong as to be *neceſſary*; and i can find any diſtinction between the one caſe and the other, I co ceive it to be ſufficient to keep the eſtate in the heir at law. N portions to daughters are generally given to them as advancement m arriage; accruer of ſhare by ſurvivorſhip might come too *late* to e of uſe in *that* reſpect; and it is only *probable conjecture* therefore o ſay that ſhe meant ſuch ſhare *ſhould accrue*, rather than *deſcend* to he heir. Therefore it was I grounded myſelf on this principle at rſt that certain intent, not probable conjecture, was *neceſſary* in iſheriſon of the heir.

Mr. *Hargrave* on the other ſide—I ſubmit the ſame reaſon, which nduced her to prefer the iſſue *male* to the iſſue of her *former* huſand, would alſo induce to prefer the iſſue *female* to the heir at law. The limitation to the *daughters* is ſtill more material, for it is to *all* nd *every* my *daughter* and *daughters*; therefore if there had been ne daughter *only* born, ſhe would have been preferred to the heir. Now what difference can be effectually taken to ſhew that the heir as meant to be preferred to the reſt of the daughters, if *more* than ne upon the death of one; who was *not* preferred to that *one* if here had been *one only*: Then the limitation over to the heir at w is this—"and for default of *ſuch* iſſue" what iſſue is this? It efers to the precedent words "*all* and *every*" for the daughters hould take in remainder *before* the heir, who was not to take until fter a failure as *full* as could be expreſſed.

Dyer 303. Croſs remainder between *more than two* and againſt he heir.

4 *Leon.* Where the court adjudged in a manner which ſhews that n *ancient* times, where a more rigid interpretation of wills was held han has been for a long time paſt, *implicative* conſtructions were dmitted to raiſe croſs remainders, where reaſon ſupported them. The next caſe I ſhall cite is *Holmes* and *Meynell*—*Raymond*—*Skinner*—Sir *Thomas Jones*—and *Pollexf.*

I ſhould *not* have relied on the word "*all*" ſo ſtrongly, if it had not been relied on in a determined caſe, *Spelman* and *Stonor*, 9 *May*, 1768.

The words of Lord *Camden* are, "this caſe is very clear on the "words *each* and *every*, *independent* of the authorities; and is much "ſtronger than the caſe of *Wright* and *Cadogan*,* in which I grounded my opinion on *Trueſdale* and *Beſt*."—And I truſt I ſhall ſhow this was the very caſe which was the ground with the houſe.

Lord *Mansfield*—You muſt not go to that, for *that* [meaning the oppoſing deciſion in the Houſe of Lords] would *prevent* our ſending the caſe back. I don't think in fact it *was* determined, for the judges were not called in, I was up—and ſtaid a little, and then went out— but be it as it will, we muſt take it for granted it was *not* determine there; for the court of chancery *can't* ſend a caſe *preciſely* the ſam which has been *already* determined in the Houſe of Lords.

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* The caſe which is before the court now of Wright and Holford, as I underſtand, only the names differing.

Mr. *Hargrave* continued—I ſhall only beg leave to ſay, tha Lord *Northington* determined for us.

Lord *Mansfield*—You don't mean on the appeal. This was e plained, and at laſt it appeared Lord *Northington* was admitted have thrown out an opinion in their favour, and Mr. *Hargrave* pro ceeded to obſerve, that he had ſtated Mr. *Yorke* in his argument, holding it *too clear* to be argued.

In the caſe where they refuſed to *imply* a croſs remainder; th was, becauſe it was to have ariſen upon a *contingency* which *neve* happened the deviſee dying *before* ſixteen, this is the caſe in *Dyer* Two reaſons are given in the caſe of *Gilbert* and *Witten*, again croſs remainders, one that the deviſe being to the two ſons by *ex* *preſs* limitation, there ſhould be *no* croſs remainders by implication ſecond, not between *more* than two, but this caſe has been *ſince* de termined on contrary reaſons; and it is not doubted that a man ma create croſs remainders between more; by *expreſs* words. The onl queſtion is therefore, whether he ſatisfies the court upon the circum ſtances of his intent. In *Cumberbach*, the word "reſpectively" wa uſed, which certainly ſeemed to *imply* the limitation over to tak effect in failure of reſpective iſſue, which muſt mean *excluſive* croſs remainders; and the word "all" was *not* there. The ca of *W.* and *Brown* was ſtronger, for the word "*all*" was in th will, but there was alſo the word "reſpectively;" and though was ſaid the court did not determine in the caſe of *W.* and *Brow* upon that word, yet in *Davenport*, it is admitted they did.

I apprehend that the preceeding deviſes to the ſons are *not* a ver different thing from the deviſes to the daughters; every family ha a greater regard to *ſons*—and it rathers turns the other way—th meant it to deſcend entire to the ſons; but not ſo to the daughers— and I apprehend what is obſerved by way of interpretation ſtands i its full force.

1 *Leon.* 14. Deviſe to the ſons, and if they died without iſſue, re mainder—there was what Lord *Pemberton* calls in the caſe of *Holm* and *Meynell* a *preſumption* of *nature*, that he would not diſinherit hi iſſue in favour of a ſtranger; the caſe of *Holmes* and *Meynell*, it wa ſaid, was *not* ſo ſtrong, there were only the words "*they* and *all*." I contend, there was alſo in that caſe the *ſame* preſumption of natur which I hope will *always* prevail, over an intent in the leaſt degre *doubtful*, expreſſed in *diſheriſon* of the heir.

[I

[It was objected, that if it was once determined in the court of Chancery, this would bar a caſe being made.

Lord *Mansfield*—Not at all, when they come for farther directions than what appear on the decree.]

It was ſaid, and I don't deny it, other parts of the will may be looked into to explain—this I don't deny; and I hope it will be ſo; there is a limitation with reſpect to the younger children, that if any of the younger children die *unmarried* and under age, that *then* the ſhare or portion ſhall go to the ſurvivor; and if *all*, then the ſhare to go to the *inheritance*. This inſiſted for, inferring a like intention *here* (which was the uſe made) would, I think, rather imply that if there had been a like intention, the maker of the will *knew* how to limit a *croſs* remainder in *expreſs* words, had done it, and therefore would have done it. The maker of the will in *that* clauſe relating to younger children, was *not* ſatisfied with *implying* croſs remainders in default of iſſue; but took care it ſhould paſs by the *proper* way of *expreſs* limitation. There appears a *predilection* I deny not; but we are not to look into this appearance, nor the *grounds* of this *predilection*, but rely on the *clear* and *certain* title of the heir not to be defeated, unleſs by clearneſs and certainty againſt it. We rely on an old diſtinction not admitting croſs remainders, where they might have ariſen between more than two. I ſhall content myſelf with ſaying, that all the caſes cited differed *materially* as to the circumſtances, the heir would have been diſinherited in ſome of them, if the croſs remainders had not been implied; in an other it would have gone in diſheriſon of the teſtator's remaining children reſpectively.

Lord *Mansfield*—Let it ſtand over.

Does not Lord *Hardwicke* rely greatly on the uſe of the word "*reſpectively*" in the caſe of *Comber* and *Hill*, and *Williams* and *Brown*? And the word "*reſpectively*" *disjoins* the inheritance; and this is very near as ſtrong as the word which you admit would imply a croſs-remainder. To this it was again inſiſted, that ſuperfluous words, which *muſt* have been *implied* if not expreſſed, could make *no* alteration.

Lord *Mansfield*—In conſtruction of *intent* it certainly would,* as where it is in default of *ſuch* iſſue the whole to go over, this would have been implied if not expreſſed; and yet the want of ſuch words *appearing* in the will, would make a great difference in argument of *intent*. [It ſeems where the word "*whole*" was uſed in *Holmes* and *Meynell* with the word "*all*," nothing would paſs until the whole could go over; and in the mean while the daughters on failure of iſſue would take by ſurvivorſhip reſpectively. But if theſe words were abſent, the implication would amount to no more (unleſs upo other ſpecial circumſtances) than that the whole would be to g over *finally* but by *parcels*; that on failure of the *reſpective* iſſue, th ſhare would deſcend to the inheritance.

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* P. W. 79—80. on the maxim, Conſtructio eorum quæ tacite inſunt nihil operatur; and Bacon's maxims.

The caſe came on for judgment the laſt day of the term, an Lord *Mansfield* delivered the judgment of the court to this effect.

May 21, 1774.

I found it the *cuſtom* to ſay *nothing* upon caſes which came for *cer tificate*; nor to declare any *reaſons* upon the *certificate*.—True the ba might come at the opinion when it came on in chancery; but I thin the cuſtom was *wrong*. The two caſes before us ſtand for our opi nion upon certificate, and we ſhall ſtate as follows.

The caſe of *Wright* and *Holford*, articles of agreement upon mar riage of *Conſtantia*, then the widow of *John Wright*, ſhe was im powered to make a diſpoſition by a deed with two witneſſes, or will with three witneſſes, of any eſtate which ſhould come to he during coverture, or by deſcent to her huſband, or any remainder or reverſions under the ſettlement, which ſhould ariſe. She becam entitled as *coheir* by the death of her *brother* to an *undivided moiet* which he gives in truſt to her huſband for life, without impeach ment of waſte, (then a term of five hundred years with eſtates ta to the ſons of the marriage,) and then follows deviſe of the ſam eſtate to the uſe of *all* and *every* the daughter and *daughters* of me th ſaid *C.* by *P. Holford* lawfully, *&c.* and the heirs of their body lawfully ſuch daughters if more than one, [to take as tenants in common an not as joint-tenants,] and for default of ſuch iſſue to the heirs of m *Conſtantia* for ever. She died *without revoking* her will, leaving ſon and heir at law and two daughters.—One died at two years old the other is unmarried and an infant. Queſtion, therefore upo the death of the elder daughter an infant and without iſſue; whe ther the heir at law became entitled after the death of *P. Holford* We ſhall not go into the caſes which would be *too long* the laſt da of term; but we ſhall ſtate the certificate in *ſuch* words as will carr the *reaſons* with them, and will manifeſt the diſtinction between th and the caſes of *Cumber* and *Hill*, and *Williams* and *Brown* ſtrongl relied by on Serjeant *Hill*.

The opinion we are of will be certified in theſe words—"ther are *no* words in the ſettlement of remainders or reverſions to lim over the ſhare of the two daughters, upon their dying without hei of their bodies *reſpectively*; on the contrary the *whole* eſtate is *expreſſ* limited over upon the failure of *all* the daughters and *all* the iſſue." (Theſe words are *emphatically* put in to ſatisfy Mr. Serjea *Hill*) there is no limitation upon failure of daughters *reſpectively*, o of the heirs of their bodies *reſpectively*, but in as *full* words as can be, *general* and *total* failure of *all* and *every* the daughters, and *all* nd *every their iſſue*.

We think they take CROSS REMANDERS.

Warranty.

MOTION for a new trial on a verdict againſt evidence, upon an action of warranty, for an horſe of the price of 17 *l*.

Lord *Mansfield*—I would adviſe you to ſet down with your loſs, ather than come for a new trial when the jury have determined or the ſeller. No ground for a new trial. Better it ſhould be de- mined once for all right or wrong.

New trials unfavourable, eſpecially where the perſon, on whoſe ſide the verdict is, will be affected with ſomething of a criminal nature.

New Trial.

ON an action brought for mal-proſecution againſt an attorney, the jury had found for the defendant; the plaintiff moved to e let in to a new trial.

The court ſaid, defendant was ſufficiently tried *once* where the ſuit was *criminal*.*

Attachment.

THE attachment goes of *courſe* for non-performance of an award; and in order to get rid of it, you muſt ſet aſide the ward.

Verdict.

IT ſeems where a ſpecial caſe has been reſerved a new trial has been granted, without previouſly ſetting aſide the former ver- ict.

Coſts in Ejectment.

WHERE there is ejectment, and judgment againſt the defendant by default, there is *no* recovery of coſts upon the udgment, becauſe the defendant is only nominal. In this caſe you nay bring an action in conſequence of judgment to recover *meſne* rofits, and coſts of ejectment.

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* Nemo bis diſcrimen ninibit pro eodem delicto.

Goodright.

Goodright.

EJECTMENT.

Queſtion on the Effect of a Reſiduary Clauſe.

TESTATOR *ſeiſed* in *fee*, made his will in 1753, with th
clauſe—" in caſe my perſonal eſtate (which I have before devi
ſed to my wife) be not ſufficient for payment of debts, then I devi
my lands in *Aldercombe*, to truſtees for payment of my debts; and
not ſufficient, then the reverſion of inheritance of my wife's jointu
to be liable; all the *reſt* and *reſidue* of my real and perſonal eſta
whatſoever and *whereſoever* to my dearly beloved *wife*. The wi
proved the will, the perſonalty was ſufficient to pay his debts.

Queſtion: Whether he meant to comprize the eſtate deviſed
the truſtees, and include it in the *reſiduary* clauſe? If he did, the wi
will take; if not, the heir.

Contended, that he could not mean to give this eſtate to his wif
becauſe he thought that it might not be ſufficient to pay debts, *Ro*
caſe—" deviſe to *R. B.* if he pay all my debts and funeral expenc
" for ever; and if he do not pay them, deviſe to Mrs. *E.*
" all the *reſt* and *reſidue* not herein *before* bequeathed." Devi
contended to be *executory*; but as *B.* died before the teſtator th
court would not admit of that; and they ſaid that Mrs. *E.* cou
not take by the *reſiduary* clauſe.

The different words "*not before deviſed*" which were in th
caſe make *no* alteration, but are merely tautologous. The reſidua
clauſe is here, as generally, *mere* matter of courſe; there is a ca
where a man with words wide enough to paſs his *whole* intereſt n
knowing of an intereſt he had, it did not paſs.

1 *P. W.* 302. *Coke* and *Oakley*. *A.* went to ſea; his father left du
ing his *abſence* certain leaſehold eſtates to him; he returning left h
gold buttons, tobacco-box, and *all other* things to his dear frie
Oakley. Queſtion, whether the *leaſehold eſtates* would paſs? Trev
held *not*, and that executor held as truſtee.

Mr. *Wilſon*—On the ſtate of the queſtion, that if any thing th
heir ſeemed to have the worſt caſe becauſe the firſt clauſe gave
the truſtees, the other to the wife; and the queſtion (even if it we
any thing) *only* between the wife and truſtees.

But take the *whole* it is thus. If deviſee ſhould take upon fa
lure of a contingency which never happened; now on the plain i
tent I ſubmit the deviſee ſhould not.

Row was determined on the ground of a lapſed deviſe. *Wright* and *Holt* was the ground. He deviſes expreſsly all his lands in *E.* to *J. Carter*, and his heirs; and if he died without heirs, then over. *Carter* died without iſſue, in the life of the teſtator. The deviſe over can't take place, even under the reſiduary clauſe, becauſe the lands had been *expreſsly* deviſed.

2d *Vern.* 394. Deviſe to *J. S.* of 500*l.* if he were *alive*, and ſhould come from beyond ſea; deviſe over void.

Bethel and *Holmden.* Lord Chancellor, 16 *Nov.* 1772. Teſtator *H.* directed his lands to be ſold, intereſt to the wife for life, and to his three nephews, who ſhould be living at the death of the wife. They all died in the life-time of the wife; the reſt and *reſidue* was given to the wife. Queſtion, whether this would paſs the intereſt of the lands ſold for money? Held it would not.

1 *Leon.* 251. Deviſe of lands in fee for erecting and maintaining a free ſchool, and all other his lands, to *T.*

[Lord *Mansfield*—This muſt be a miſtake; for all *other* his lands is an expreſs *exception.*]

2d *Raym.* 1324. Teſtator directed his debts to be paid immediately after his deceaſe, and gave power to his wife to ſell his lands for payment, (if need ſhould be) and to pay legacies; and all the *reſt* and *reſidue* to his wife. Lord *Cowper* was of opinion, though a power given to the wife to ſell, and fee paſſed, ſubject to payment of debts, that ſhe took nothing. There can be no ſtronger implication, in caſe the perſonal eſtate ſhould *fail,* he deviſes to truſtees, in payment of debts, if the perſonal then anſwered as it did, he did *not* deviſe.

How great the abſurdity, that if the perſonal had *not* been *entirely* ſufficient, that then the *ſurplus* ſhould be a reſulting truſt to the heir at law. Lord *Talbot* determined it ſhould not, but 3d *W.* 61. the Lord Chancellor, and three aſſiſting judges, thought otherwiſe. How ſtrange, then, that, if the perſonalty is entirely ſufficient, the whole real eſtate deviſed, as ſubſidiary to it, ſhould paſs to the wife.

Mr. *Cuſt*—That there was a ſtrong diſtinction between the caſes; becauſe the deviſe to a man and his heirs is good, upon *contingency*; namely, if he ſurvive the teſtator.

On one ſide it was obſerved, that the wife was legatee of lands purchaſed after the marriage, by way of farther proviſion: On the other ſide, that this was not (even in the idea of civilians) ſufficient to let in the heir; becauſe it is not *inofficioſum teſtamentum*; for he gives legacy to the heir, *eo nomine.*

That as to ſo much of the caſe as lands to be turned into mone that very circumſtance anſwered them; for then, under the nam of reſidue *void* eſtates, eſtates after acquired would paſs.

In the caſe of *Sprig*, he deviſed his whole eſtate for payment debts; there could be then no *reſidue*, unleſs out of that ſurpluſage.

The caſe before the preſent Lord Chancellor was on a queſtio whether by the word *eſtate* the wife took in fee, or for life; n whether ſhe took or not.

That the caſe in *Forreſter*, *Malabar* and *Malabar*, went upon th circumſtances whether he meant the eſtate ſhould be real or perſonal. It was declared there, by Lord *Talbot*, that it appearing on th will that he meant it ſhould be ſold at all events, and made *perſona* therefore the heir could not take, but deviſee muſt. The devi was, " All the *reſidue* of my *perſonal* eſtate."

Lord *Manſfield*—The teſtator, *Humberton*, being ſeiſed in fee the premiſſes in queſtion, and divers others in *Lincolnſhire*, and elſewhere, after ſeveral precedent deviſes, legacies, and bequeſts, pa of realty, deviſes thus:

" In caſe my perſonal eſtate, excluſive of ſuch part thereof as
" have before given and bequeathed to my wife, ſhall not be ſuffi
" cient to pay my debts, I give to my brother, ——, and my friend
" ————, and their heirs, in *truſt*, to pay debts and legacies
" and ſupply defects in the *perſonal* eſtate." And in caſe not *ſuffi*
cient, *then* he *deviſes* the reverſion of inheritance of his wife's join
ture; and wiſhing and hoping his *perſonal* and real eſtate in *A.* ſha
be *ſufficient* to pay *all* pecuniary legacies, and alſo particular legacie
to his heirs, on condition of giving up their claim to lands under th
uncle's will; then comes the reſiduary clauſe of *reſt* and *reſidue* t
his dearly beloved wife. This action is brought by a coheir for
moiety.

There are two ways of conſidering the queſtion; firſt, whethe this *reſidue* does not take in the lands, as *not* deviſed. Now th lands are deviſed upon a contingency which *never* happened. Thi is, it ſeems, as if there had been *no ſuch* limitation at all. Now the deviſe is only in caſe *perſonalty* ſhould not be *ſufficient*, which i was.

But ſuppoſe, on the other hand, there had been a *ſmall* part neceſſarily to be paid, and accordingly *paid* out of the lands—as t this, there would have been a *reſulting* truſt to ſome body. As fo

Ma

Mr. *Cuſt's* objection in point of *form*, it has been often over-ruled: No man ſhall be *nonſuited* on account of an eſtate in his *own* truſtee.

Now under the will, if the heir were to have the truſt *reſulting*, the truſt is only a part of his title. Now what is this? It is only a truſt eſtate, and in equity nothing more than to raiſe money by ſelling, or mortgaging for payment; then after payment it carries the *whole* ſurpluſage; ſo that either, as was the fact, there being *ſufficient* from the perſonal, or if there had not been quite ſufficient, the *widow* was *entitled*; and the *reſt* and *reſidue* carries every thing but what was neceſſary for the payment of debts.

Postea for the **DEFENDANT.**

Stainham *againſt* Bell.

THE caſe was thus: Deviſe to a ſon, of which he ſuppoſed his wife enſeint, of his whole eſtate, with certain limitations f it ſhould be a daughter. And on failure of iſſue of ſuch ſon in ail, or daughter dying under age, remainder to his wife, the wife ſhall take, though no after-born ſon or daughter ever came into being.

Limitation upon contingency of failure of ſuppoſed future iſſue; that iſſue never comes into being, the limitations over as good as if the contingency had happened of ſuch iſſue being born and failing.

1 *Peere Williams*, 390. Deviſe to ſon in tail; if ſon ſhould die without iſſue, then to *A.* his wife; then to *M. S.* in tail; then remainder for life to the plaintiff. *A.* dying in the life of the ſon, upon ailure of that contingency, the remainder over is *void.*

That the caſe before the court is diſtinguiſhable from *Jones* and *Weſcombe.*

The deviſe in the principal caſe was, "Whereas my wife is now " pregnant, if ſhe bring forth a ſon, I deſire he may have my eſtate " when he comes to twenty-one years, paying certain annuities: But if " ſhe has a daughter, a moiety to my wife; the other moiety to my " *two* other daughters, ſhare and ſhare alike. If either of them die *be-* " *fore* twenty-one, then ſurvivorſhip to the daughter; but if *both* die " without iſſue before twenty-one, then the whole to my wife." he caſe in fact was, that no ſon was born, nor any daughter.

Queſtion, Whether the wife ſhould take?

Moore, 486, 487. Covenant to levy a fine; remainder to the irſt, ſecond, third, and fourth ſon; and if it fortune the fourth ſon *ie* without heirs of his body, then the eſtate to *H.* He never had ore than *one* ſon. Limitation over, the court was of opinion, was *ood*; and the words not *conditional* but merely *limitation*.

3d *Lev.* 105. [*qu.*] Upon ſpecial verdict, this caſe, that *A.* w ſeiſed in fee, and had four ſons, deviſe to his wife; but if ſhe *ma ry*, then that the firſt ſon, *H.* enter; like remainder to the oth ſons. She never did marry. Queſtion, Whether the entail cou take place?

2d *Str.* 1092. *Andrews* v. *Fulham*; where *Gulliver* v. *Wicket* cited; and *Jones* and *Weſtcombe*, *White* and *Barber*, argued befo this court.

Therefore if there was but *one* daughter, he could not mean th *one* ſhould take more than *two*, and the wife nothing: And it a pears that if the daughters *both* failed, the mother was to take t *whole*; therefore, on *general* failure of iſſue, the mother was take.

Lord *Mansfield* aſked, whether there were not many of the mo dern caſes which came nearer than *White* and *Barber*?

Mr. *Davenport* alluded to one argued by Mr. *Heath* and Serjea *Glynn*.

Lord *Mansfield*—I only aſk the queſtion, whether there was a difference, except that there was not a fee, but the lands deſcende to the heir in the mean while?

Yes, my Lord; and perhaps becauſe the wife might take as ex cutrix.

Lord *Mansfield*—It is remarkable, this was very finely argued b the two *Roman* orators, *Craſſus* and *Scævola*, in ancient *Rome*, on t will of *Coponius*; and that the caſe was admirably argued ſo lon ago, upon the *intent* and ſtrict *letter*, mutually contended for and o poſed.

Mr. Juſtice *Willes*—If two daughters, he gives a moiety to t wife; *a fortiori* if but *one*.

15 *May* 1774, laſt day of *Eaſter* term.

Lord *Mansfield* having firſt introduced, in the manner above r ported, the caſe of *Wright* and *Holford*, proceeded to judgment u on this caſe, which he pronounced in the following terms nearly:

The next is a new one in it's form—*W. S.* ſeiſed of the premiſſe made his will. "And whereas my loving wife is *now pregnant*, " ſhe bring forth a ſon, I deſire he may inherit my eſtate, payi "

“ to my wife 4 *l.* a year; paying 30 *l.* to one daughter, and 10 *l.* “ to the other. If ſhe ſhould bring forth a daughter, a moiety to my “ wife, and a moiety to my daughters, when they come to the age “ of twenty-one. And if they die under age, and without iſſue, “ the ſurvivor to take the ſhare: And if they *all* die under age, and “ without iſſue, the *whole* to my wife; and if my wife die before “ my daughters, and they die without iſſue, then I give the whole “ to my heir at law.”

The teſtator's wife was *not* enſeint at the time of making his will, or death; the daughters died without iſſue, under age; the mother married the defendant, *B.* and died.

This is different from the famous caſe of *Jones* and *Weſtcombe*; the eſtate will deſcend to the heir at law till the contingency—and they are *all* executory deviſes—and if a ſon had been born, and lived to age, none of them would have taken place. But we ſhall not go into the reaſons, or diſtinguiſh the caſes, but ſimply ſtate our opinion.

We think it was the *plain* intention of the teſtator, in caſe *no* ſon ſhould be born, and he ſhould have *no* daughters who ſhould live to the age of twenty-one years, that the wife ſhould have the *whole* eſtate. Therefore we think, on the *event* that has *happened*, that ſhe ought to have the *whole* eſtate.

The caſe of *Coponius* was 660 of *Rome*, 1834 years ago, and was declared by Lord *Mansfield* to be the ground of *Jones* and *Weſtcombe*. Vide *Cartrou Hiſt. Romaine*, vol. 14. and *Cic. de Oratore*, and in ſeveral other of his works.

Deed.

ACTION of debt upon bond, with a certain day. Plea. Agreement that the bond ſtood only as an indemnity, and that the plaintiff was not damnified, and judgment of the court, whether he ought to recover. On this they join iſſue in demurrer at law.

And the queſtion before the court was in effect, whether *parol* evidence could be admitted to prove a *condition*, where the conveyance was *abſolute*, without fraud, upon the face of the record?

On the part of the plaintiff, it was contended that *no parol* evidence could be admitted, to vary and change the nature of the ſpecial obligation expreſſed on the deed.

To prove this, he firſt obſerved that not even on a will can parol evidence be brought to make good a deviſe, except where all appear clear on the face of the will; and the uncertainty is extrinſic, and ariſing out of evidence. And that therefore, though in the caſe o *Malabar* Lord *Talbot* ſuffered evidence to be read, that the teſtato meant ſuch a perſon ſhould take as deviſee, and not a perſon as deſcribed by the will, the next day he ſaid he had been *wrong* in admitting that evidence; but thought there was enough to determin on the will.

Law Tracts Reg. 23 of his Maxims.

There is an *excellent* diſtinction, with the uſual ingenuity of th author, laid down in *Bacon*, upon the difference between an *apparent* uncertainty on the face of the inſtrument, and a *latent* uncertainty, reſulting from *external* evidence. He ſays, a *ſecret* uncertainty of words not apparent on the face of the inſtrument is cure by averment, for that ambiguity which ſprings from matter of fac is removed by averment of the fact:* But an ambiguity *apparent* o the face of the inſtrument is *never* holpen by *averment*. And th reaſon is, (as he very excellently adds) becauſe the law will not coupl and mingle matter of *ſpecialty*, which is of the *higher* account, wit matter of averment, which is of *inferior* account in law; for tha were to make all deeds *hollow*, and ſubject to averments; and ſo i effect, that to paſs without deed which the law appointeth ſhall n paſs but by deed.

Therefore, if a man give land to *J. D* and *J. S. et hæredibu* (without ſaying whether of their heirs) it ſhall not be ſupplied b averment to whether of them the intention was. And he adds (afte another inſtance of the caſe of perpetuities) infinite caſes might b put; for it holdeth *generally*, that all ambiguity of words, by matte within the deed, ſhall be holpen by conſtruction or election; (ne ther can apply to this caſe) but *never* by averment.

And there is a caſe in *Croke* very like the preſent; only it was n there attempted to go ſo far. They wanted to vary the effect of th deed as to *circumſtance*; not to defeat it in *ſubſtance*, and take aw it's operation *entirely*. The caſe was, *Cro. Eliz.* 697. *Hayford* *Andrews*, debt on obligation; condition to pay the money at a ce tain time; agreement pleaded to pay at a future day; plea ba 1 *H.* 7. *Brian* Juſtice. That it never was known, from the beginnin of the world, that a man might aver againſt a ſpecialty by matte *diverſe*, where the deed had a *legal* commencement.

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* Ambiguitas verborum latens verſificatione ſuppletur; nam quod ex facto o tur ambiguum verſificatione facti tollitur.

Ambiguitas verborum patens nullâ verſificatione ſuppletur.

In 8 *Co. Altham*'s caſe, *A.* levies a fine to *William*, his ſon—Upn this the judge can't make queſtion for any matter of law; but w the party comes, and avers matter of fact, that *A.* had *two* ons named *William*, an elder and a younger, and his intent was to vy the fine to the younger: This averment out of the fine is *good* f this matter of fact, which ſtands well with the words of the ne, and ſhall be tried by the country.* But if a man by deed ives to one of the ſons of *J. S.* who has divers ſons, here he ſhall ot aver which ſon he intended. And a little lower he cites the aſe cited by *Bacon*, and authorities from the year-books; and adds, o averment can make that good which, upon conſideration of he eed, is *apparent* to be *void.*

Caſe of *Andrew—Fitz-Gibbons*—Bond—Plea againſt it, that it as for compoſition of felony. And the Lord Chief Juſtice held he plea *good*; but it was becauſe this went to the deſtruction of the eed which never had a legal exiſtence,§ if it were true, and was ot a *collateral* plea, which did not go to the deſtruction of the deed ſelf.

Alſon and *Mears*, K. B. *Hil.* 1771. The Chief juſtice is ſaid to ave declared, that there never was heard a caſe, he believed, in hich *parol* evidence was admitted to *annull* or *ſubſtantially alter* a pecialty.

Lord *Mansfield*—If the fact is true, it's a proceeding contrary to ſolemn agreement upon a ſatisfaction; which the law will no more uffer, than to proceed on warrant of attorney after ſolemn agreement and ſatisfaction.

Make a motion to ſtay proceedings, reſerving the demurrer: And f, on what Mr. *Wilſon* has argued very ſtrongly, the court ſhall be f opinion you can't plead againſt the terms of the bond, then you will conſider if you cannot amend your plea, by coming in for ſaisfaction, or what is tantamount.

What cannot be maintained as a plea muſt not be given in evidence, [nor made uſe of on motion. ‡]

Rule propoſed, upon condition of giving up the plea of *non eſt factum*, payment of coſts, if againſt them, and judgment final up-

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* Ad quæſtionem facti non reſpondent judices ſed juratores.
Ad quæſtionem legis non reſpondent juratores ſed judices.

§ Idem eſt contra legem eſſe ac omnin non exiſtere.

‡ Quod fieri vetatur ex directo vetatur etiam ab obliquo.

on demurrer, that the defendant may be at liberty to amend h
plea.

They not waiving their plea of *non eſt factum*, and it appearin
to the court that the plea of agreement was falſe—

Judgment for the **Plaintiff.**

But, for the ſake of the *bar*, Lord *Mansfield* obſerved that th
objection had been *perfectly right* to the *collateral* evidence. But
there had been merits, the court would have got at it another way

Covenant to ſecure quiet Poſſeſſion.

ON a queſtion, whether covenant ſhould extend to diſturber b
wrong, or under lawful title only. Covenant by mortgag
out of poſſeſſion to indemnify againſt all loſſes, charges, or expence
which covenantee might be put to by mortgagors, or any perſo
claiming under them. Aſſignees enter under a commiſſion of bank
ruptcy againſt mortgagor, and with-hold poſſeſſion; breach aſſigne
that he has not peaceably and quietly held and enjoyed, nor ca
peaceably hold nor enjoy, according to the true intent, &c. for th
certain perſons entered, as aſſignees under the commiſſion. Th
defendant replies, that he is mortgagee out of poſſeſſion, and th
the entry complained of was by certain perſons claiming as aſſigne
under *A.* and *B.* as being then bankrupts; whereupon demurre

Dyer, 28. was cited. Covenant to keep quiet the poſſeſſion. Ob
jected, that the diſturbance was by wrong, and that therefore th
plaintiff might have had treſpaſs; but the court ſaid, the agreeme
being *generally* to poſſeſſion, and the principal cauſe of the covenan
that therefore the plaintiff ſhould recover.

Lev. 298. It was ſaid, that the *poſſeſſion*, and *not* the *title*, w
the ſubject of the contract. (So that the covenantor was to ſecu
poſſeſſion to the covenantee, whether diſturbed by right or wrong

Hob. 34, 35.

In the principal caſe it was obſerved, that a mortgagee out
poſſeſſion having no poſſeſſion to paſs, covenants for the poſſeſſio
and title. That covenantee would have *no* benefit of his title, unle
covenantor were liable; as he would not have *legal* poſſeſſion, n
remedy againſt diſturbers, with or without title.

Objectio

Objected on the other ſide, what can mortgagee's warrant, but as far as their own title as mortgagee's? They cannot maintain an ejectment: And the entry under the commiſſion was lawful.

Lord *Mansfield*—Muſt it not be taken for granted, on this pleadhat the diſturbance is by wrong? They have pleaded it ſo; and ou have demurred, and ſo admitted it, inſtead of joining iſſue.

Demurrer in law admits all facts in controverſy between the paries in the point of demurrer.

Queſtion aſked from the bench—Is that commiſſion in force?

Undoubtedly—was the anſwer.

Mr. Juſtice *Aſhhurſt* obſerved, this plea was very odd, not avering they were then bankrupts, but ſaying, "claiming as aſſignees " under *A.* and *B.* *as* being then bankrupts."

Lord *Mansfield*—I think it's very clear the covenant does not conain treſpaſs.

Judgment therefore for defendant on the firſt count.

There was another count, for giving poſſeſſion; on which judgment for the plaintiff, poſſeſſion never having been conveyed.

Penalty on Bond.

DEBT is the *ſubſtance*; penalty is the *form* of recovering it. As ſoon as the court of Chancery had determined that the debt was *only* the money upon the bond, and this court had determined, ſince the ſtatute of uſury, that the penalty was *not* uſury, it s aſtoniſhing there ſhould be any difference. And an annuity is *exctly* in the ſame predicament; and the judgment ſtands as a ſecurity or the payment, yet by a great inconſiſtency, whereas notes carry intereſt on bankruptcy for forty years back; yet where there is a bond with *penalty*, they do not in the Exchequer; for there they conſider the penalty. Per Lord *Mansfield*.

Note, This inconvenience renders demurrers much leſs frequent; eſpecially as their end is often attained in divers ways, as by ſpecial verdict, caſe reſerved, areſt of judgment, bill of exceptions, &c. after the facts found.

Information.

ON an information againſt printers of a news-paper, for publiſhing a libel, reflecting on a juſtice of peace.

The author of the letter had complained at a ſeſſions, at whic the plaintiff ſat as judge, "*that he had not done him juſtice*" Th juſtice brought his action upon theſe words.

When this action was to be tried, a paragraph appeared in th paper, and ſtated this ſtory, and the words ſpoken; ſtated a deman of general ſubmiſſion, and aſking pardon of all the world. An then theſe words were added, "It's left at the aſſizes, to be determined whether theſe words, on the circumſtances, were a reflection on his worſhip's honour, or no." This ſeemed to have bee added by the printers. The circumſtance urged as the greateſt aggravation was, it's coming out againſt the aſſizes.

On the part of the plaintiff—That he did not come prepared f his defence againſt inſinuations of cruelty and oppreſſion in his conduct, as not expecting that perſons ſtanding before the court, unde ſuch circumſtances, would have turned accuſers. However, that h did not proſecute out of vengeance, but with a public view, to deter men from ſuch aſperſions on magiſtrates, as would ſet them u as objects of public reſentment, and diſcourage them from doin their duty.

It was farther urged for the plaintiff—That he had the verdict o the jury on his ſide; that he was a gentleman of fortune and reputation; that he did not proceed upon the indictment on account o a defect of formality, whereas, had he been vindictive, he migh eaſily have purſued it farther.

That the paper complained of ſets out with an attack which th plaintiff is accuſed of having made on that liberty and freedom o ſpeech which every man in this country has a right to enjoy.

That this paper "ſtate of *facts*" ſays, that the defendant ſaid t the proſecutor, in as modeſt terms as any gentleman could do, tha he thought he had not done him juſtice; and concludes with leaving it, whether, under theſe circumſtances, the defendant ſpeaking the truth, was a reflection on his worſhip's dignity, or no.

It is ſaid, it would be very hard to puniſh printers, who publiſh *every thing* they receive.

[Lord *Mansfield*—You need not go on. I did not ſuffer that part f the affidavit to be read.]

That they did not know the authors. The counſel ſaid—I hope o man now exiſts in this kingdom who does not know this to be o excuſe. That they did not know the parties. I believe this is ften the caſe: For if they did, the ſcandal thrown out on the high- ſt, the moſt reſpected characters, would never have been caſt up- n them, even by the moſt wicked of the tribe. And it is no ex- uſe that, be the character ever ſo innocent or honourable, they knew ot but it might be ſo, and therefore aſperſed it by a ſcandalous ublication.

The plaintiff ſubmits the mode and meaſure of the puniſhment to he juſtice of the court.

Lord *Mansfield*—There is a delicacy on the part of the proſecu- or, in offering to accept any terms, if propoſed to him; but from he court it would have a different appearance. I do not know whe- her it would not be beſt that they ſhould pay the proſecutor the oſts of the ſuit. The court would not have granted the informa- ion on a common trifling libel. This is a reflection on a magiſtrate, cting right or wrong, and it ends with leaving it to be determined t the enſuing aſſizes, whether this be a libel on his worſhip, or no. On this laſt clauſe we muſt grant the information; as it tends to pre- udice the deciſion then depending. But I think the plaintiff does ot come quite *properly*; as he firſt appeals to the tribunal of a ublic news-paper—A *very improper* one for a magiſtrate to appeal o.

Bolton *againſt* Smith.

In Arreſt of Judgment.

ACTION for toll—four counts.

1ſt, That he is lord of the manor of *G.* in the county of *L.* and hat he and all his anceſtors have repaired; in *conſideration* whereof hey have time out of mind taken toll of all veſſels unloading with- n the manor.

2d Count omits the conſideration.

The two other counts were not particularly obſerved upon, as i was admitted they could have no objection againſt them but wha went againſt the two firſt.

And the objection was, firſt, that the conſideration laid on the firſ count is inſufficient in law.

2d, That having been laid, it ought to have been proved.

Lord *Mansfield*—How does it come?

Anſwer—By a rule to ſhew cauſe.

Lord *Mansfield*—Why, then they ſhould ſhew cauſe.

3 *Lev.* 734. cited.

Lord *Mansfield*—What they quote from *Levinz* is not precedent it is the identical caſe.

Another 2d *Lutwyche*, with the *dictum* of Lord Chief Juſtic *Treby*.

Lord *Mansfield*—Never mind that: The *dictum* will *not* do.

Another in Serjeant *Wilſon's* Reports, 290. third of his preſen majeſty: That this caſe goes farther, and the conſideration is mor extenſive.

That upon the firſt count, declaration is ſufficient to maintain th toll.

On the other ſide, Serjeant *Hill*—That the principles of Serjea *Wilſon*'s caſe were ſtill for him: That was a toll *traverſe*, or fo paſſing *through*. *There* a conſideration *muſt* be laid; *here* it need not, but, as they have laid it, they put themſelves on the proof. ſubmit, by laying it they make it part of the preſcription: And the I hope, upon the authority of the ſecond caſe, that I may ſay con ſideration inſufficient.

I beg leave to ſay, that toll is not now enjoyed; nor ever wa within memory.

Lord *Mansfield*—You cannot to that in *arreſt* of judgment.

Lord *Treby*'s opinion quoted, that where conſideration is not w alledged, ſtill the plea may be good. The plea in that caſe wa *erga reparationem*; inſtead of alledging *actual* reparation. Now here *actual* reparation *is* alledged.

Serjeant *Hill* objected notwithſtanding, that no body ought to be ſubject to the conſideration but thoſe who partake the benefit.

Lord *Mansfield*—Here it does; for you land either upon the wharf, or land within his manor.

The conſideration is well alledged, of being bound to repair without *actual* reparation.

The third objection, that the ſecond count was certainly bad, and that it was all *one* action: And in action upon the caſe for words, where one count was bad, though the firſt was good, the badneſs of the one vitiates the judgment entered upon it.

Lord *Mansfield*—It is admitted, that, *after* verdict, *conſideration* will be preſumed; either the ſame as laid, or a good one. The caſe in *Levinz* was about an hundred years ago: Put a marginal note, and it will ſerve an hundred years hence.

28 *April.* Serjeants called, *Groſe* and *Adair*, eſquires.

Roads.

UPON the act of parliament giving power to commiſſioners to continue private ways, it was queſtioned whether they were to repair themſelves, or compel others to repair them.

Lord *Mansfield*—What, are they to continue them, and leave them to be impaſſable?

It is plain who were liable to repair *before*, ſhall be bound *ſtill*. And thoſe who were liable to repair in reſpect of tenure for the frontage of the ſide roads, ſhall continue ſo.

Berkenſhaw *againſt* Gilbert.

Revocation. Queſtion.

ACTION of treſpaſs. Caſe ſtated. Defendant juſtifies, as by authority under a will by teſtator, duly executed in 1759.

On ſpecial verdict, caſe for the opinion of the court, on the fo
lowing circumſtances: That teſtator in 1759 made his will; du
executed, and publiſhed at the ſame day an exact duplicate; the ſub
ſtance of the will is ſtated. And upon the parol it appears, and
ſtated, that teſtator ſaid to a labouring man, one of the witneſſe
that the will was made to make his wife eaſy. That he ſaid to an
other, it was not a will to his liking; and he did it becauſe h
thought his wife was near her death, and wanted to make her eaſ
The duplicate is found to have been in the cuſtody of his daughte

That afterwards he ſends for Mr. *S.* his attorney, *tears* off th
ſeals, and orders the witneſſes name to be *cut out*, which was accord
ingly *done*, and in his *preſence*. That he made a new will in 176
the ſame day, and gave it to a friend to keep; "for he would no
"have his heir at law find it." That he ſent for his ſecond will
and that he ſent, being in his ſenſes, to an attorney, to come an
make him a new will; but was out of his ſenſes *before he came:* Th
the ſecond will was *found cancelled after* his death, and the *firſt* foun
cancelled after his deceaſe, *both* in *one* paper; and the duplicate of th
firſt found *uncancelled* in one of his drawers, after his deceaſe.

Mr. *Morgan*—That the cancelling a *duplicate* was cancelling th
original. 2d *W*. 346. *Onyons* and *Tyers*, and 2d *Vern.* the teſtato
cancelled *that* will with great deliberation, which was in his poſſe
ſion; in our caſe the uncancelled part, it is *found* by the verdict, wa
in poſſeſſion of the *daughter*, who claims *againſt* the *heir* at law.

This diſtinguiſhes our caſe, in the cleareſt manner, from the ca
cited; where the teſtator meant to cancel only on a miſtaken ſuppo
ſition, and the deviſes were effectual as to the real eſtate, being ſub
ſtantially the ſame as to perſonal.

There appears *no* intention to *republiſh*, ſuppoſing the court coul
ſet up an *implied* republication. The *laſt* act of ſenſe before hi
death was ſending for an attorney, to make *another* will.

3d *Bur*. 1496. A will made by a joint-tenant during the continu
ance of the joint-tenure, is *not* good after the ſeverance, though *par*
tition before his death, unleſs by *expreſs republication*.

Lord *Hardwicke* ſaid, that in a caſe where a will was declare
void, *unleſs* the teſtator returned from *Ireland*, nothing could *ſet*
up, unleſs ſomething *done* by the teſtator, *after* his *return*, made
defeat the condition. After the ſtatute of frauds, therefore, by th
having been *once void* and *annulled*, (not merely *ſuſpended*, for th
ſeems the diſtinction) nothing leſs than *republication* (which is,
it were, a *making* of it *anew*) could be *ſufficient*. For it could no
be *once void*, and good by *after* act, *other* than of remaking, or *r*
publiſhing. Therefore a will made by a *feme ſole*, who afterwar
marri

arries, and ſurvives her huſband, is not good by event of his death, nleſs *republiſhed*; becauſe there was a time in which it could *not* ave been *good*, and the power once *merged* could never *revive* of *ſelf*, but muſt be *created again* by ſome *expreſs* act, *purporting* the ntent of the party to uſe it as ſhe had done before her death; by n act after, *between* the time ſhe becomes *capable* to uſe it, and her eath. The reaſon for the diſtinction of this caſe from a will *only ſtructed* by a latter will is, becauſe then *neither* are perfect till death, nd it is every moment in the teſtator's *election* and *power*, during fe, *which* ſhall *ſtand* and be his *laſt* will: But when he has once xed his *election*, by ſaying, this ſhall *not* be his will, unleſs he does certain thing, it *cannot* be ſo *againſt* his declared *intent*, till he hall have *done* that thing, or duly *revoked that* declaration made: nd having once ceaſed to be his will *at all*, it cannot be his *laſt* ill, unleſs he ſhall have taken ſome after notice of it, amounting *gally* to a declaration of it's being ſuch.

3 *Vern.* 741. by Lord Chancellor *Cowper*.

Party claims, as under the heir at law.

Parſons and *Freeman*, 1 *Wilſon*. Determinations upon revocations f wills have always been *favourable* to the *heir* at law.

On the other ſide—That the jury have found a due *legal* will, according to the *ſtatute*: That the will, *thus executed*, was found *af*r the teſtator's death, in his room.

What has intention or implied revocation to do? The ſtatute reuires a cancelling or *obliterating* by teſtator himſelf. Is it *deſtroyed* y a ſecond will? Nothing but a ſecond will *cancelled* againſt it.

Glazier and *Glazier* determines the doctrine of *Eccleſtone* and *Speke*, *nyons* and *Tyers*, and the caſe in *Lev.*

Caſe 10 *G.* 3. the queſtion, whether a ſubſequent *cancelled* will ad the power of *revoking* a *former ſubſiſtent* will, your Lordſhip dermined, the former will, when *cancelled*, was *no* will at all: But ncelling the ſecond will, the teſtator alſo *deſtroyed* the *revoking* art; then the former will ſtands unimpeached.

Where both parts of the duplicate were in the teſtator's poſſeſſion, ere can be no reaſon to ſay, that a *duplicate cancelled* was an *effec*al *cancelling* of the *original*.

2 *Ver. Preced.*

Chancery Proceedings, 64. The caſe there determined was only at the *cancelling* the part in his *own* poſſeſſion was no effectual cancelling of the will: And his cancelling was only on the ſuppoſitio that he had made a ſecond will at the time.

In this caſe, ſays *Peere Williams*, it was ſaid by Juſtice *Powi* and not denied by *any*, that if a man had *two* wills in his poſſeſſion the cancelling *one* was *no* effectual cancelling of the *other*.

Now in *Cumberbach*, *Lambrey*, the teſtator ſent for his will ou of his eſcrutoire, and *cancelled* it; and it was held ſufficient cancelling of the other duplicate, which he had not by him.

In *Viner* I find the ſame caſe, with a material difference fro *Peere Williams*.

The *Equity Caſes* abridged, 407. A man makes his will, and duplicate; he then makes a ſecond will, not duly atteſted; he the *cancelled* the *duplicate*. Determined, that this was no *ſubſtantive independent* act, by which he meant to ſet aſide the *original* will, ſo a to *intend* to die inteſtate: It was not *intended* that the *ſecond* wi ſhould be *barely* a *revocation* of the firſt; but he intended it ſhoul be a form accompanying his making of the ſecond will, which h meant ſhould be a *diſpoſing* one.

Lord *Mansfield*—There was a caſe, of *Maſon*, I think, before th court of Delegates, that where a man made a will, (and diſpoſin real and perſonal) and concluding, "In witneſs whereof, &c. and the teſtator had *ſigned*, but not the witneſſes, this was a goo will, as to his *perſonalties*; but they determined he did not mean i ſhould be a will *at all*, *unleſs* it could operate as a *general* diſpoſitio of his property. Here is the ſtrongeſt evidence he never meant t die inteſtate; he made a will and duplicate.

The counſel continued—*Swinburne*, p. 502. cites ſeveral method of revocation; the two firſt relate to the *civil* law; the third doe not hold ſince the ſtatute of frauds; the fourth is of a contrary ſubſiſting will; the fifth of revocation, notwithſtanding derogator clauſe; the ſixth, that a will with a greater number of witneſſe may be revoked by a will with fewer; ſeventh relates to the civ law; eighth revocation good, notwithſtanding oath not to revoke.

Lord *Hardwicke*, 3d *Atk*. 375. *This court*, upon *revocations* muſt go upon the *ſame* rules as a court of *law*. A court of equit does *not favour* revocations againſt the *plain intention* of the teſtato

Neale and *Roberts*, 3d *Bur*. 391. *Conſtructive* revocations contrar to the *intent* ought *not to be admitted*, and caſes of that nature hav brought a *ſcandal* on the law.

Lord *Mansfield*—State the caſe of *Onyons* and *Tyers*. Did he not ſtop in the act of cancelling?

He had made a will in 1707; he made in 1711 a ſecond will, with a clauſe of *revocation:* He called for his wife, to *cancel* the *former* will, and a witneſs ſwears he heard her *tear* it.

Mr. Juſtice *Aſton*—That is another caſe. I ſuppoſe there was a *former* will *ſubſiſtent*.

Where teſtator had torn off ſeven ſeals of a will of eight, the eighth remaining; upon the attorney's deſiring him to ſtop, for the other would not be good, he ſtopped: The ſecond will was bad, the firſt uncancelled then took effect, the other being *void*.

Glazier and *Glazier* was tried before Lord Chief Baron *Parker*, who was of a different opinion. The ground was, he makes a firſt will; then he makes a ſecond, which he afterwards cancels; and then, *undoing* what he had *done*, ſets up the *former* will.

Mr. Juſtice *Aſton*—There's a caſe in *Perkins*, *directly* in point.

Mr. *Morgan*—This was not the caſe of *Glazier* and *Glazier*, the duplicate not then being in the *poſſeſſion* of teſtator, it does not ſignify that it was *afterwards* in his cuſtody: He cancelled all he *could*.

The firſt will was not cancelled. 2d *Equity Caſes Abridged*, 766. *Cummins*, 383. Lord *Cowper* ſaid ſince the ſtatute [of frauds] there can be *no* deviſe of lands by *implied* republication: For a paper in which a deviſe of lands is contained ought to be *re-executed*. Teſtator ſaid to ſeven perſons, "I ſend to you to be witneſſes of my will; (and "ſometimes of the republication of my will)" and holding the will in one hand, and codicil in the other, he ſaid, "This is my *laſt* "will; and I direct my codicil to be taken as a *part* of my will." Witneſſes ſubſcribed the will and codicil, both lying on the table; and he declares in the codicil his intention not *entirely* to revoke the will before made. But Baron *Parker* thought an *expreſs* republication neceſſary.

Submitted, that the *original* will or *duplicate* being *cancelled*, is the ſame as if the name of *teſtator* and witneſſes had been *cut off*.

Nothing could have *republiſhed* but three witneſſes of the *republication*, in the *preſence* of the teſtator.

There is no evidence of teſtator's *knowing* there was an *uncancelled* will *actually* in his poſſeſſion.

On the whole, the perſon has died *inteſtate.*

Lord *Mansfield*—I don't believe we have any of us a doubt. There is no caſe in *point*, I think, to be got, and there needs none; the *principles* are *very clear*. *N. Newington* duly made and executed his will in 1759: It is not material to ſtate the circumſtances; I ſhall only ſay it is material to take notice it is not the ſame with that in 1761. And *cancelling* is an *equivocal* act, which, therefore, demands *evidence*, and admits *evidence* of *this kind* to *explain* it, *quo animo.* Witneſs, that it was made to make his wife *eaſy*. He told a man that it was *not* a will to his liking, and he made it to make his wife *eaſy*, as he thought her *near* her *death*; "but if he *lived* he would "*alter it.*" The wife died.—He ſent in 1761 for his *old* will, to *alter* it; he made *another* will the *ſame* day; and then *tore* off his name from the *old* will, and the ſeal, and deſired Mr. *Samſon*, his attorney, to tear off the names of the witneſſes, not contented with an expreſs clauſe of revocation. He ſaid, he deſtroyed the old will becauſe he wanted to give a greater ſhare to his granddaughter, *M. Ingliſs*; otherwiſe his daughter, Mrs. *Weſton*, would have *more* than her ſhare. That he gave the *new* will to *Samſon*, and deſired he would *keep it as private as poſſible*: (From a jealouſy of his daughter) And he ſaid that Mrs. *Weſton* had got the other part of his will in 1759.

Let us pauſe a *moment*, and put the queſtion, whether the will of 1759 *revoked?* Now, ſince the ſtatute of frauds, a will cannot be *revoked*, (except by *operation* of *law*) unleſs by an *inſtrument* with the forms required by the ſtatute; or by *tearing*, *cancelling*, and *deſtroying*. We obſerve, this *tearing*, *cancelling*, and *deſtroying*, is an *equivocal* act, and it is neceſſary to ſee, *quo animo*, to make a *revocation*.

Suppoſe a man, *meaning* to throw ſand on his will, throws *ink*; this is *perfect obliterating*, but not with an *intention* of cancelling.

If a man orders a friend to cancel his *firſt* will, inſtead whereof he cancels the *ſecond*, this is *no* cancelling the ſecond. In the caſe of *Onyons* and *Tyers*, it was a doubt, as to fact, whether he did cancel ſecond. That could never mean to revoke the *firſt*; for *all* the material deviſes of lands were the *ſame*, and to the *ſame* perſon: He thought he had made a *good* and *effectual* will, according to the ſtatute of frauds.

Lord *Cowper* ſaid, if even the *law* held it *revoked*, yet, on the head of *accident*, a court of *equity* would *relieve*. This would be *very difficult* to maintain; but it ſhews the reaſons on which they went; namely, of the intention: For though the intention will not ſupply requiſites of poſitive law, ſuch as atteſtation of three witneſſes, *&c.* yet, as to all the reſt, the *intention* is to be ſhewn, to prove revocation.

In order to ſhew *intention* to revoke (revocation being in itſelf an equivocal act) *parol* evidence *muſt* be let in.

He makes a will in 1759—at the deſire, and to pleaſe his wife—He gives a *greater* ſhare to *A. W.* than he *thought* ſhe *ought* to take. This will is left in the hands of Mrs. *Weſton*. He makes a duplicate, which he *keeps*. He makes in 1761 a *legal good* will, with a *poſitive* clauſe of *revocation*. Not content with revoking the will of 1759, (not only by making *another*, but by *poſitive* words) he alſo *deliberately cancels* the firſt. And it appears, by his own declaration, that the counterpart of the will was in Mrs. *Weſton*'s poſſeſſion, and that he could not take it out of her hands, becauſe he meant it to be kept *ſecret*, and expreſſes a fear, leſt Mrs. *W.* or *A. N.* ſhould come at it. And he clearly never meant the will of 1759 to be made uſe of; and he gives at the ſame time the will of 1761, to be kept ſafe. Let us ſtop here, and ſee whether the will of 1759 was *now revoked*. *Certainly*; and it could never be *ſet* up, but by a *new* inſtrument of republication. A deviſee (the granddaughter, *Mary Ingleſs*) died; and therefore he wants to cancel the will of 1761: He ſends to make another, and for his old one of 1759, which he is very particular in deſiring may be wrapt up in a piece of clean paper. [ſealed] It muſt be between *Auguſt* 1761, and *December* 1762, the time of his death; it does not appear preciſely *when*. The will of 1761 is ſent him; the attorney *comes* in about an hour, upon the ſame day in which the will was ſent for; but too late to receive directions for *another* will, the teſtator at that time being *inſenſible*.

If the queſtion was made, whether the cancelling of the will of 1761 were a *conditional* revocation, it would be a very *different* queſtion. It is remarkable too, *mind this*, that he wraps the *two cancelled* wills in the *ſame* piece of paper. On his death, the counterpart of the cancelled will of 1759 is found in his drawer, among his deeds, *uncancelled*. It muſt have come from *A. W.* but *when*, on *what* meſſage? It may be it was ſent for the day before his death, when he had not time to cancel. It is a very ſtrong and *plain* caſe, without looking into the time when the other part of the will came into his poſſeſſion; or whether at any time before his death.

POSTEA for the PLAINTIFF.

Harman

Harman *et al.* Aſſignees of Fordyce, *againſt* Fiſhar.

Action of Trover upon Notes.

CASE. Defendant, *Fiſhar*, creditor of *Fordyce and Compan* gave credit farther for 7000 *l.* which he *borrowed* for the *ſup* *port* of the ſhop, and which was to be replaced in ſix days, bein lent during the holidays.

Before the time *fixed*, and *without demand*, Mr. *Fordyce* ſits up a night, delivers the letter to be ſent to Mr. *Fiſhar*, "*To Mr.* Fiſhar, to this effect:

> " Mr. *Fordyce*, conceiving that the ſum lodged in his hand
> " might be liable to *diſpute*, has the honour of giving Mr. *Fiſha*
> " that *preference* which he thinks he undoubtedly deſerves, tw
> " notes incloſed, 5,500 *l.* 1,7000 *l.*"

He gives the letter to his clerk, to deliver to Mr. *Fiſhar*, an about an hour after goes off; after which commiſſion iſſues the ſam day, and Mr. *Fiſhar* receives the notes three days after, and refuſ to return them, legally demanded.

Upon this it was argued for the plaintiff—That here, therefore, o the eve of a bankruptcy, he expreſsly declares a *preference* intended

Queſtion.

The notes are in Mr. *Fiſhar*'s hands: And whether, on the cir cumſtances of the caſe, the plaintiff is entitled to recover, is th queſtion.

Argument. Firſt, that ſuch preference, in contemplation of bankruptcy, is void.

Whether it was a compliment to Mr. *Fordyce*'s juſtice, on the ev of his bankruptcy, to give that preference, in *contemplation* of bankruptcy, is not the point. This queſtion has come before th court in a *variety* of inſtances, and I know *none* ſo ſtrong, upon th circumſtances, as the preſent, to determine ſuch act *void*. Whethe this is an act of bankruptcy, might be another queſtion: But that i is ſuch a preference as the laws will not allow, by the principles lai down by your Lordſhip, I beg leave to inſiſt.

Slader *and* De Matto's.

4 *Bur.* 467. The caſe was, *James Davis*, an agent of *Dematto's* knowing *Slader* to be indebted, and that he could not carry on hi trade, unleſs ſomebody in *London*, as a banker, would pay hi draughts, negotiated, in *July* 1756, an agreement between the ſai *D*

De Matto's and *Slader*, that *De Matto's* ſhould pay *Slader*'s draughts, on having ſecurity.

The nature of the ſecurity, and terms of the agreement, appeared only by a deed of 23 *October* 1773, prepared and procured to be executed by the agents of *De Matto's*.

The deed recites *Slader*'s title to the mill and premiſſes; his being concerned in merchandize, and frequent occaſions to draw, and remit to *London*; and his requeſt that *De Matto's* would be his banker there. And, in order to indemnify him for ſo doing, *Slader* aſſigns over to *De Matto's all* his eſtate, and intereſt in the premiſſes aforeſaid; and *alſo all* his ſtock in the trade of brewing and making malt, and in the buſineſs of a corn-factor and miller. Then follows general aſſignment of *debts*, horſes, *&c.* and *all other goods* and *commodities* belonging to the ſaid ſeveral trades; with *defeazance*, however, on *Slader*'s paying to *De Matto's* all the money he ſhould advance on any note, draught, bill, or writing, of the ſaid *Slader*, and his indemnifying *De Matto's* againſt the ſame, and all matters any way touching his agency.

Covenant on breach of failure of the conditions, that *De Matto's* may enter upon the premiſſes, and take the ſtock abſolutely to his own uſe.

8th *October Slader* drew on *De Matto's* for 200*l.* 23d, Another bill, both by authority of *De Matto's*. *De Matto's* knew *Slader*'s affairs to be in a bad ſituation. *Davis*, *De Matto's* agent, repreſented *Slader* as a good man to his creditors, and concealed from them *colourably* the general aſſignment.

On the 11th of *November*, *Slader* told *Davis*, and another agent of *De Matto's*, that he could not ſtand, and conſulted them what to do. The reſult of the conſultation was, *Sills*, by order of *Slader*, the ſame day, gave poſſeſſion to *De Matto's*, in the perſon of *Davis*, his agent, who immediately ſet out for *London*. Next day, the 12th, *Slader* ordered *Sills* to deny him; which *Sills* did on the 13th, and told the reaſon, that it was to *commit* an act of bankruptcy.

Slader had nothing of value but what was comprized in the deed.

After the 13th of *November De Matto's* paid the two bills.

Firſt queſtion, whether *Slader* became a bankrupt?

The ſecond and great queſtion, in that cauſe, was, on what day *Slader* became a bankrupt?

The ground urged againſt him was, that the deed was *fraudulen* and colourable, and no poſſeſſion *altered*. And that, if there ha been a debt *due*, it was an *undue* preference within the act.

For the defendant—That bankruptcy was a *crime*, and this not *crime*, nor any bad uſe made of the deed. Your Lordſhip delivere the judgment of the court, of which I ſhall cite ſome parts, as pa ticularly applicable to this caſe.

All the acts concerning bankrupts are to be taken together, making one ſyſtem of law.* They are all to be conſtrued *favour ably* for creditors, and to *ſuppreſs* fraud.

The *law* is to judge of fraud upon *facts* and *intents*.

The indemnity is a *good* and valuable conſideration; and the dee valid, *as* between the *parties*.

Acts valid between the parties may be fraudulent and void againſt a third perſon.

But *valid* tranſactions between the parties may be fraudulent, b reaſon of covin, colluſion, or confederacy, to injure a *third* perſon ſo purchaſe, with notice to the prejudice of the firſt purchaſor, wh bought and did not complete his title; ſo marriage, brocage, bond ſo *Tywne*'s caſe, 3 *Co.* even on a criminal proſecution, and the co ſideration undoubtedly ſufficient and *true*.

Whether the deed then in queſtion would be fraudulent in th ſort, your Lordſhip ſaid would depend on the purpoſe of it.

It was a *falſe ſhew*, by colluſion to prejudice a third perſon.

The great objects of the bankrupt laws are, the management his eſtate, and an *equal diſtribution* amongſt the creditors: Bo would be defeated by *ſuch* a preference.

An equal diſtribution has been anxiouſly provided for ever ſinc the 21 *Ja.* 1. *c.* 19.

It was thought miſchievous to ſuffer priority to be gained by *ſe cret liens*.

A caſe only of a conveyance, calculated to *poſtpone* one creditor t the reſt, was held by Lord *Hardwicke* an act of bankruptcy.

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* Leges in pari materia conjunctim interpretandæ.
Ea conſtructio veriſſima quæ malum ſupprimat et remedium operetur.

A colourable exception of parts does not cover the fraud of the aſſignment.

A conveyance of a part may be *public*, fair, and honeſt; but a conveyance of *all* muſt either be fraudulent and kept ſecret, or produce an immediate act of bankruptcy.

It has been *argued*, that *after* a reſolution taken by a trader to commit an act of bankruptcy, the trader ſo reſolving may lawfully prefer a *juſt* creditor, by conveying *part* of his effects.

It is not neceſſary to determine that queſtion in *this* cauſe; for here the conveyance is of *all*: And therefore I will only ſay, that no ſuch propoſition is yet *eſtabliſhed*; much leſs in the extent whereto it has been urged.

In the caſe of *Cock* and *Goodfellow*, an *immediate* proſpect of a *certain* bankruptcy was *not* the motive.

No deed can be fraudulent in *Chancery* which is not fraudulent in *law*. And if fraudulent, it is an act of bankruptcy, and this was the *true* deciſion of *Leigh*'s caſe.

The diſtance between the deed (which was *immediately* put in execution) and the act of bankruptcy was, in that caſe, from eighth of *June* to eleventh of *February* following.

Small and *Oudley* was a tranſaction *beneficial* to the creditors.

2 P. W. 427. T. M. anno 1727.

Linton and *Bartlet*. I have a copy of this caſe, by the late Mr. Serjeant *Lee*, who was counſel in the cauſe. One brother indebted to another 150*l*. he had an upper and a lower ſhop. In *contemplation* of bankruptcy, he aſſigns the goods in the *one* ſhop, of much leſs value than the extent of the debt, and abſconds the next day. Whether this was a *void* contract, and an act of bankruptcy?

Lord Chief Juſtice *Wilmot* ſaid, it was a ſubverſion of the principle of all the bankrupt laws, which was *equality*. And he ſaid, that though the judges, in *Worſley* and *De Mattos*'s, ſaid the conveyance was of *all*, yet he knew, in his opinion, and that of the reſt of the judges, that it would have made *no* difference in the caſe.

A *falſe credit* upon a *ſecret truſt*, if the aſſignment were otherwiſe good, would make it bad.

Oſtenſible poſſeſſion and a ſecret lien would make an aſſignment void, though otherwiſe it might have been good.

The donor's *continuing in poſſeſſion*, ſecond argument in *Twynn* caſe.

A trader is truſted upon his character, and *viſible* commerce. Th credit enables him to acquire wealth. If, by *ſecret liens*, a ſe might ſwallow up *all*, it would greatly *damp that credit*.

Every equivocal act may be explained by circumſtances: And t uſe to which it is applied ſhews, *quo animo*, it was done.

On the whole, that the conveyance, though by way of ſecuri and for a *valuable* conſideration, is fraudulent, and an act of ban ruptcy.

This is the ſubſtance, nearly, of what is reported of your Lor ſhip's opinion. It is true it is ſaid the determination there is up the aſſignment of *all*; but, on a general view, let me endeavour ſhew how it applies.

The argument that *all* the ſtatutes of bankruptcy, as in *pari m teria*, are to be taken together, is a general principle of law a reaſon, and applies as much to the caſe now as then before the cou The reſult from all, taken together, is there very truly laid down be a conſtruction *favourable* for creditors, and in ſuppreſſion *fraud*: It will not be favourable to the creditors that Mr. *Fiſh* ſhould receive, and Mr. *Fordyce* be permitted to give, 7000*l.* fro the reſt of the creditors; eſpecially, which is the *ſecond* point, wh this is done in *immediate certain* contemplation of a bankruptcy, a when the very loan of this 7000*l.* had, in it's nature and *manif* conſequences, a tendency to induce the other creditors to be at e under a *falſe* ſecurity.

The legal notion of fraud.

Judging of fraud, (I mean *legal* fraud, which, eſpecially in ban rupt caſes, means an act unwarranted by law, to the prejudice o third perſon, and not that crafty villainy, or groſſneſs of deceit, which it is applied in common language) judging of it by facts a circumſtances, there is here an act deluſory, at leaſt, in it's natu effect on the creditors, prejudicial to them in an high degree, j and fair, indeed, as between the parties, if they *only* had been co cerned, but not warranted by *law*; not that *open*, *regular*, *pu* act, not that *equal* diſtribution which the law requires in favour creditors, the ſecurity of commerce, public policy, juſtice, a ſafety.

The goods (theſe two notes) were *never* out of Mr. *Fordy* hands till after he became a bankrupt; for the poſſeſſion of his cl was his *own* poſſeſſion, and *revocable* every moment: And by the act of bankruptcy, immediately following, in *fact revoked*.

It is a *ſecret* tranſaction: And the reaſon given by your Lordſhip, in the caſe of *De Matto's*, why a conveyance of part may be not an act of bankruptcy is, becauſe it may be *public*, fair, and honeſt. This is not *public*; and to permit it to take effect would be injurious to the creditors, to the ſpirit of the bankrupt laws, and to public credit and commerce.

That a ſecret conveyance, tho' of part, is an act of bankruptcy.

Such an act would have been fraudulent in Chancery; becauſe ſecret, unwarranted, and *againſt* the law, and hurtful to honeſt creditors: It will therefore be *fraudulent* in law; and being fraudulent, will be *void*, as againſt the *creditors*, with reſpect of whom it is fraudulent.

That if fraudulent in equity it will in law, and therefore void againſt creditors.

The diſtance here between the act of bankruptcy and the ſending the notes (if the ſending itſelf was not an act of bankruptcy) is the diſtance between one *moment* and the next.

The act of bankruptcy immediate after ſending the notes.

It was thought miſchievous, ever ſince the 21 of *Ja.* to ſuffer priorities to be gained by *ſecret* liens. This might now be the conſequence: And it is not expreſſed what theſe notes come in payment for; and Mr. *Fiſhar* was not bound to accept them in payment for his 7000*l.* and before he could accept them (before they came into his hands, or he had knowledge about them) the law took them, and they are in the hands of the law.

That it does not appear on what conſideration they come to Mr. Fiſhar, and before his acceptance determines the law takes them.

But, as it may be ſaid, that the caſe of *De Matto's* is not in point, notwithſtanding the parity of reaſoning, becauſe that was an aſſignment of all, I will proceed to a caſe which was an aſſignment prompted by natural affection, the faireſt conſideration, and as juſt and favourable grounds as can well be ſuppoſed, in this or any caſe, and which yet was void, as againſt creditors, though an aſſignment of part only.

The caſe of *Linton* and *Bartlet*. I will ſhew what this caſe was, and how *dangerous* it is to rely upon caſes, without attending to *circumſtances*.

Caſe reſerved laſt ſummer aſſizes; *J. Linton*, trader in *Eſſex*.

The bankrupt, *J. Linton*, carried on the trade on his own account: The money lent to carry on the trade; no intereſt paid upon it. He aſſigns the goods in one of his two ſhops to his brother, who had lent the money, and immediately abſconds.

The opinion delivered was to this effect:

“ This is a very plain caſe. It is a hard caſe; as all theſe caſ
“ are upon particular creditors. *Equality* is the grand object of t
“ bankrupt laws; and partiality to be avoided. No man ſhall b
“ permitted to put a fraud upon the court. If he may give a pr
“ ference to one he may to more. This was an aſſignment of pa
“ of the effects. It has never been decided how much might b
“ aſſigned without act of bankruptcy. The ſhutting up of *one* ſho
“ was giving as clear intimation of inſolvency as if he had ſhut u
“ *both*. The aſſignment was the ground of the judgment.

[Mr. Juſtice *Willes*—Was this determined an act of bankruptc
or *void* conveyance?

The ſending theſe notes not an act of bankruptcy.

To this it was anſwered, upon *both*. But Lord *Mansfield* obſerve
it could not affect the queſtion *here*; as it was *impoſſible* to conſid
this as an act of bankruptcy. There was no doubt.]

It may be aſked, at what point, then, ſhall a trader be permitte
to make this preference? It is a queſtion not eaſily admitting of
preciſe *definite* anſwer. But, I think, one *general* principle or tw
may govern it, if rightly applied to particular caſes. If we ſay fro
the act of bankruptcy, the caſes do not agree with this, the end an
ſpirit of the bankrupt laws does not agree with this; and there ma
be a preference void, as againſt other creditors, where there is n
bankruptcy. The caſes, reaſon and policy, and general juſtice, wi
bear us out in ſaying, that from the time a man is become *inſolven*
ſo that he cannot prevent the bankruptcy attaching on him inſtantl
(though ſome happy accident, or providential intervention *may*) fro
that time he cannot give this preference; though for a valuable co
ſideration, and though not *yet* a bankrupt. Nor, ſecondly, can h
give it in contemplation of, and in actual intent to commit, an a
of bankruptcy.

That a man actually inſolvent, or 2d in contemplation of an act of bankruptcy cannot give preference.

That tho' not a conveyance by deed, ſo as to be an act of bankruptcy, it may be void as againſt creditors.

Either of theſe, but particularly the firſt, apply to the caſe i
Temple and *Alderton*. Though it cannot be an act of bankruptcy
unleſs there be a *conveyance* by *deed*, in the ſenſe of the ſtatute, a
to this clauſe, yet the court could never ſet up the validity of ſuch
tranſaction.

I don't ſee the difference between Mr. *Fiſhar* and any other cre
ditor. He would not have truſted ſuch a ſum had he ſuppoſed th
houſe in danger, and he truſted like another creditor. And whe
Mr. *Fordyce* had ſet up *all* night, declared his preference in his lette
abſconded the next morning, ſurely, this conduct ſufficiently explai
how the act is to be underſtood, and what ſhould be the conſe
quence. He is gone before the letter is delivered, and before th
uſual office hour. If it ſhould be admitted that ſuch a preferenc
might be given, the moſt *opulent* creditor, from whom ſervices ha
bee

been received, and *future* ſupplies and ſupport of credit was expected, would always be paid off, and the poorer left to come in for their ſhare under the bankruptcy.

I have no doubt your Lordſhip will be much urged by Mr. *Dunning* on the caſe of *Small* and *Oudley*. Your Lordſhip has obſerved, that Sir *Joſeph Jekyll*, in his decree, gave very *ſtrong* reaſons *againſt* the decree, and declared himſelf bound by the opinion of Lord Chief Juſtice *King*, who had declared, that the aſſignment, being not *void* in equity, would not operate as an act of bankruptcy: The reſt of the court differed very greatly.

I hope your Lordſhip will think this ſo like the caſe of *Temple* and *Alderton*, that it muſt be determined upon the ſame principles, and the contract cannot be maintained; and therefore the aſſignees ſhall recover.

That contract void, and therefore aſſignees ſhall recover.

Mr. *Dunning*—The firſt queſtion will be, whether a *preference*, in contemplation of bankruptcy, be *allowable* in *any* circumſtances?

For the defendant.

2dly, Whether if *any*, this be *not* the caſe?

I heard, not without aſtoniſhment, that my learned friend could find no diſtinction between this and the caſe of a common creditor.

So far from putting the money in order to be ſafe, Mr. *Fiſhar* took it out of his houſe, where there was no danger, into the houſe of *another*, where, from the very *purpoſe* of placing it, he underſtood there *was* danger. I hope he was not ſo far miſtaken in the *degree* of danger.

Your Lordſhip will ſee what the degree of danger *was*, and when he expected a reimburſement. In the holidays, if bank is ſhut, the bankers ſhops are open, and no relief in the ordinary way. It was foreſeen when the bank would be open, about the middle of the week, and then he meant to call it out. It was meant a loan for *temporary* purpoſes, to be releaſed on the *Tueſday* following: They agreed to the time of the loan.

As to the aſſignment of part, that it may be allowed in general. In the caſe of *Worſley* and *De Matto's*, your Lordſhips are reported to have ſaid, that *no* ſuch propoſition has ever yet been eſtabliſhed, at leaſt in that extent. That is to ſay, that he may do *every* thing that he could have done before. I hope the *contrary* has never yet been eſtabliſhed, that in no circumſtances, a man in contemplation of bankruptcy can do *any thing* at all.

That a man in contemplation of an act of bankruptcy may do ſomething, tho' not every thing.

The point on which Sir *Joſeph Jekyll* conſidered himſelf bou by the authority of Lord Chief Juſtice *King* was, that there cann be, by the law, an *equitable* bankruptcy where there was not a *leg* bankruptcy.

[Lord *Mansfield*—That an aſſignment by a trader cannot be *v* in equity was the propoſition; if it was bad in *equity* it was an of bankruptcy.]

Small and *Oudley*. Transfer of 500*l.* *South-Sea* annuities they ſ out of the ſtocks. In contemplation of their bankruptcy, they, ha ing ſhut up their ſhop, make an aſſignment of their ſtock, and a of ſome ſhare in the wool trade, and ſome leaſehold intereſts, *Small*, *without his privity*.

It is ſaid there, "It may be a juſt reaſon for a *ſinking* trader " give a preference to *one* creditor *before another*; to one who h " been a friend to him in his *extremities*, rather than others wh " very probably, have been gainers by their trade with him. T " ignorance of *Small* is a circumſtance in his *favour*; as an *un* " *influence* could not be uſed, or *importunity* on his part, in order " obtain his debt, which is common in many caſes; eſpecially " otherwiſe the *whole* debt muſt be loſt."

I think nothing can more expreſsly apply than this caſe.

" The time of the aſſignment is *not* material, ſo long as it be b " fore the bankruptcy; but the *juſtice* of the caſe is very materi " The ignorance of *Small* is a circumſtance in his *favour*; becauſ " ſhews he did not obtain the *preference* by any *importunity*." Ther fore he is ſo far from making his ignorance of the aſſignment *agai* him, that he makes it an argument *for* him.

Can I ſtate a caſe more exactly in point? The honeſty of the c is very material; the time is immaterial, and the want of privity the aſſignment is in his favour.

I know not an authority to which *all* the practiſers in the prof ſion are more inclined to aſcribe *great* weight and *great* judgme And as his *honeſty* was known as remarkable as his learning, he h gone out of the caſe to ſay, that creditors under ſuch circumſtan not only may but *ought* to be preferred.

Is this ſhaken in *Worſley* and *De Matto's*? If the point which grounded upon the opinion of Lord *King* is ſhaken by the court, more is ſhaken: And I don't conceive it affects our part of queſtion.

It would rather ſtrengthen our caſe. That caſe, ſays your Lo ſhip, was very material. The fraud was againſt *Small*, *not* the c

dito

ditors: The money was become due by the agreement; ſo it was here, and *payable* within ſix days. *All* would have gone to the creditors; ſo here, and they are in no *worſe* ſituation than they would have been if the money had been *never* lent. The whole was for the benefit of the creditors; it ſeems ſufficient for us, and all they are entitled to expect, that it's not to their *prejudice*. It was to ſave a man from breaking—the clear object of our caſe. Your Lordſhip then was ſo far from conſidering the caſe of *Small* and *Oudley* as not law, that, I think, the judgment has given us reaſon to infer that, in circumſtances correſponding, *Small* and *Oudley* will be good authority: And, inſtead of thinking that it would be *now* decided otherwiſe, I readily declare, I can ſupport this caſe on no other principles than would prove the propriety of that: And, as underſtanding that to ſtand as undefeated, I make uſe of it upon this.

And this is the caſe which has been underſtood already decided in favour of the general creditors; and that your Lordſhip had *already* given a ſolemn deciſion againſt us.

In the caſe of *Linton* and *Bartlet*, the ſhutting up ſhop was an act of bankruptcy in itſelf.

Let us ſee whether the other two caſes anſwer better; which, if the other fails, will be referred to, though not now particularly ſtated.

It will appear they are *ſubſtantially* diſtinguiſhed.

There are, therefore, caſes where a debtor, in contemplation of bankruptcy, may give a fair preference. And the caſes in which he is *not* allowed to give a preference differ from this, and this will bring us to the ſecond point, whether this is to be a caſe of allowing ſuch privilege, if *any* may.

Before this, I will obviate the inconvenience which is ſuppoſed by Mr. *Lee*, and which he ſuppoſes will be removed by fixing at the point of *inſolvency*. He ſaw the neceſſity of ſome boundary or other, and did not fear ſetting it. Every caſe would be to be determined on it's own circumſtances—that is, left to it's confuſion, and the chance what light might be ſtruck out of ſuch darkneſs.

That inſolvency or contemplation of bankruptcy are no definite periods to determine when this right of preference muſt ceaſe.

As to the inſolvency——

Many are in that ſtate when they ſet out. Equality is the *grand* object. Wherever the court draws the line *all* the ſubſequent creditors are excluded. And in our caſe, thoſe who are contending againſt Mr. *Fiſhar* would be moſt part in the ſituation into which they wiſh to put him.

I don't mean to miſrepreſent *any* part of the idea: For beſides the idea of inſolvency, upon which I preſume he built the miſchief, he ſtated, to correct the miſchief, the reſolution to commit an act of bankruptcy.

But will this be more clear? Will it be poſſible to aſcertain when the reſolution is ſettled?

If other people had manifeſted the reſolution in other caſes, wil this be more clear? The ſame day, on a turn of fortune, Mr. *Fordyce* would have altered his intentions, and gone on, with a fair credit. Is it then the *contemplation?* for this phraſe has been *alway* uſed on this occaſion: It is then the *fear*, the *dread*, the *expectation* The *degree* of this expectation, as whether certain, probable, or *poſſible* I fear a full information would have convinced the event was *certain*, though not the *time*. A leſs degree of information would have made him think it *probable*; a ſtill leſs not probable, but merel *poſſible*.

I, who have a degree of timidity from my temper, ſhould neve have looked from this horrible object for days and years before i met me in the face, and encountered me. Mr. *Fordyce*, at the tim of the loan, was even *more* ſanguine than Mr. *Fiſhar*, in the expec tation that the aſſiſtance of Mr. *Fiſhar* would be effectual. An thus the ſenſe or nonſenſe of a man's ideas, the coolneſs or the hea of his imagination, will be to decide this queſtion.

That the fairneſs and honeſty of the preference is the only proper criterion.

But what governed *Small* and *Oudley* will govern *every* caſe t which the principle will *apply:* And it is very neceſſary this ſhoul be ſuch a certainty which is attained by fairneſs, or *honeſty* in the tran action. The rule is known and underſtood alike *univerſally*. Men' feelings run before their underſtandings, in diſtinguiſhing between rascal and an *honeſt* man. And, notwithſtanding the puzzle of th ſchools, when the rules are once fairly underſtood, and the fact agreed on, no man ever doubted the complexion of an action in tha view.

Hague and others, aſſignees of *Scot*. Aſſignment of goods. Le ter ſent, ſignifying the purpoſe. They were not of the coach wa houſe when the bankruptcy was committed.

That part of the ground of Hague *et al.* aſſignees of Scot, was ſuppreſſion.

Upon ſtating the caſe, it's clear the defendant knew *nothing* of th tranſaction: It does not appear whether he had them in truſt upo *contract*, or to what uſe.

The defendant *burnt* the letter. Queſtion, whether defendant h a right to thoſe goods, or whether overhauled by the bankruptcy Now, though it has been decided, acceptance ſhall be preſumed whe where for a man's benefit, till he diſſent, yet here, when thoſe goods were left with *Street*, what authority had *Rolliſton* over them? No one can ſay: And it is left *abſolutely* in the breaſt of the party.

When the defendant came to *Dover*, then he took the reſolution of making it a bargain and ſale; and as ſuch it is *void* and fraudulent. This was a tranſaction kept *ſecret*, and not determined whether he was to take them as agent, they being booked in his name in the public warehouſe. Whether, and how far, in ſatisfaction; whether as a purchaſor; whether as a ſecret lien, in truſt, to be returned afterwards in fraud of the creditors. All this left undetermined till after the act of bankruptcy had put the goods *entirely* out of his power.

Le Roche—There never was any courſe of dealing between the parties. Judgment of the court there was thus: "Letter incloſed "in the note is *ſuppreſſed*. It does not appear but the letter might "contain an *act* of *bankruptcy*.

That the caſe of Le Roche went on ſuppreſſion.

Your Lordſhip ſays there, " The only queſtion is, whether an "indorſing and ſending this note is fraudulent?"

That the only queſtion there was, whether fraud, or not, and acceptance or not acceptance to be determined accordingly.

"I chooſe to put it on this ground; for it is of importance in all "judicial proceedings, particularly in matters of commerce and ſuch "public concern, that they ſhould be determined on *ſolid* grounds "of *equity*, and not on *ſubtleties* of *law*. And therefore I ſhall not "enter upon the ground of a contract not complete till *aſſent*. The "principle is this; it is complete when any principles of *juſtice* or "*equity require* that it ſhould; otherwiſe *not*. In the caſe in "*Strange*, though the reaſons are founded upon *great ſubtlety*, yet "the hardſhip of the caſe undoubtedly decided with the court."

The law and equity of the caſe determines the aſſent, in this caſe, ſhould be implied.

That the equity of this caſe and the law determines to imply aſſent.

"Mr. Juſtice *Yates*—There is *no* doubt the preference might be "given on the eve of a bankruptcy, upon *fair* and *honeſt* circum"ſtances."

That Mr. Juſtice Yates allows a preference on the eve of a bankruptcy, on fair and honeſt circumſtances.

Now compare the caſes. There was in our caſe a *friendly* intercourſe of lending and ſupplying money; *there* was no previous intercourſe in general dealings. *Here* the letter produced; *there* it was not found. There it is not in ſatisfaction of any debt whatever; here is in ſatisfaction of the 7000 *l.* lent.

The letter makes the caſe plain. The notes were to diſcharge the debt, which he could not *otherwiſe* diſcharge, in order to give the juſt preference which he expreſſes himſelf bound to give. *There* it did not appear but the letter might expreſs an act of bankruptcy wa committed; it appears *here* in the negative. There the notes wer the outſtanding debt to *Everard* and *Briar*, and made uſe of againſ the principles of *honeſty* and *morality*. Your Lordſhip expreſsly *exploded* the *ſubtleties* of law upon that caſe, and reſted upon the *honeſ* of the caſe.

I will now ſtate the caſe alluded to in *Strange*.

Atkins *v* Berwick, 1 Str. 165.

Plaintiff, as aſſignee of *Crips* and *Quarme*, brings trover for ſeveral parcels of ſilks. Defendants dealt with the bankrupts before th bankruptcy, and *April* 7, 1715, ſent the goods, and gave credit i their books. 18 *May Cripps* and *Quarme*, without knowledge o defendants, ſent divers ſilks, the ſame ſent in *April*, for the uſe o the defendants. *June* 4 they became bankrupts; *June* 6 they wrot a letter to the defendants, that, not thinking it reaſonable the laſ parcel of their goods ſhould go to their other creditors, they had no entered them in their books, but left them to the uſe of defendants June 9 commiſſion iſſued; *June* 13 defendants received the letter, and as ſoon as poſſible ſignified their conſent. Lord Chief Juſtice *Pratt* ſays The aſſent was *ſubſequent* to the act of bankruptcy: They aſſented a ſoon as they had knowledge; and whether a ſubſequent diſſent wa neceſſary, (the property veſting in the mean time) was the queſtion If by the delivery the property was *veſted*, I think, upon the circumſtances, *Butler* and *Baker*, 3 Rep. the contract does not ſtand ope till agreement, but is complete till there be an *actual* diſagreement.

The diſtinction is, whether the delivery is with or *without* conſideration, the preceding debt is *ſufficient* conſideration: For it bein for his benefit, diſagreement ſhall not be *preſumed*.

A delivery precedent to an act of bankruptcy (though to a thir perſon, and without knowledge of the party) is, where *conſideratio* exiſts, ſufficient to complete the contract: And diſagreement ſhal not be *preſumed*. And to that purpoſe the caſe from 3d Report was applied.

And it's an authority: The perſon to whom delivered was *inſtantly* a truſtee; and re-delivery would not have been juſtified b an *inſtant* countermand of the party delivering. And Mr. *Harriſon* in the caſe of Mr. *Fordyce*, is as the other in the caſe of *Strange* under controul in certain reſpects, to be determined on the juſtic and honeſty of the caſe, and *not* farther; ſo that if *Fordyce* wa *wrong* in the delivery, he had been juſtified in the re-demanding and *Harriſon* liable, if he had delivered; and Mr. *Fordyce* migh have recovered.

Th

The idea of converting a poſt-boy into a *truſtee* would have been ridiculous; ſince he knows no more of the contents than a propoſition in algebra. No *truſt* would be conveyed without *knowledge* of the contents: But *Harriſon knew* the nature of his embaſſy, and would have ſinned againſt *knowledge* had he delivered to any but *Fiſhar*.

The four caſes concerned are perfectly *right*, and upon compariſon their agreement is evident.

I don't find my learned friend meant to contend an act of bankruptcy was committed. I underſtand the court delivered the caſe from *that* difficulty, which will take the fifth caſe out of the queſtion.

If the caſe has not *juſtice*, *honeſty* and *morality* at the bottom I give it up. I did not think it could have been doubted.

I conceive it will at leaſt entitle it to the wiſhes and inclination of the court; and I hope on principles and authority to their deciſion.

But another diſtinction is taken, Mr. *Fordyce* is taken as under a *double* capacity as debtor to the houſe, and debtor to the partnerſhip. If Mr. *Fordyce* can leſſen the debt to the houſe by enabling the houſe to go on, either by making uſe of his friends aſſiſtance in the manner he did or negotiating the bills.—If this had been done the ſecurity could not be taken from him. The fund to have been divided among the general creditors would *not* have been theſe bills; there would have been *no* part of them. And if Mr. *Fordyce* had ſucceeded, he would have been obliged to pay to the partnerſhip; the *general moral* obligation then will not vary by the difference of *time* or *form*.

Upon this general conſideration I flatter myſelf, the circumſtances will not be thought material to take this out of the general principles.

If the court think with Sir *Joſeph Jekyl*, that there are caſes in which a man not only *may*, but ought to give a preference to creditors, your Lordſhip I truſt will think here that it was his duty: And as to aſſent that it will be preſumed when the juſtice of the caſe requires it. And I hope the part we have taken in a caſe which ſeems ſo *meritorious*, and full of ſo much *compaſſion* will not be ſo ineffectual, as to fall by the force of *general* propoſitions which I think have *never yet been decided*; namely, that in *no* caſe whatever a creditor may have a preference given him by a debtor in contemplation of bankruptcy; and whatever the circumſtances may be as to the merits and nature of the tranſaction, the effect of law ſhou always be to make it *void* inſtead of it's being underſtood, that ſu a preference may be juſtified upon circumſtances.

In reply—That whether fraud had been committed in a *mor* view Mr. *Fordyce* had done what *legally* he might not do; and wh in the Common Pleas was not permitted in favour of a *juſt* credit who was a brother.

This is not a *contemplation* according to the manner in which th word is interpreted by my learned brother, it is an act deliberat upon knowledge that he *muſt* be a bankrupt; and he was gone performance of his reſolution *before* the letter *could* be delivere And if any thing had diverted his reſolution, theſe notes were n ſent to the poſt-office, but were *revocable*, and were until three da after in his *own* poſſeſſion; for the poſſeſſion of his clerk your Lor ſhip will conſider as *his*, the caſe determined by Sir *Joſeph Jekyl* w never doubted.

Though my private opinion would have little influence on the d ciſion of this queſtion, I muſt ſay if the court had not doubted, yo Lordſhip would never have ſaid Sir *Joſeph Jekyl* gave very gre reaſons againſt the judgment.

I humbly rely therefore on the judgment of the court in favo of the aſſignees.

Lord *Mansfield*—Mr. *Fiſher* is certainly a very *meritorious* cred tor of Mr. *Fordyce*, and in this *laſt* act did him a very *great* ſervic I therefore was all along *ſorry*; (as far as one can be ſorry or gl in a caſe of judicial litigation,) I will ſtate the caſe for the bar.

The defendant *Fiſher*, was a *creditor*, and had done them *ma* acts of friendſhip—and being creditor for 1500*l* *borrowed* the 6 of *June* 1772, the ſum of 7000*l.* and had it entered in the banke books in the *uſual* manner (which ſum he had borrowed) and to them, he ſhould not draw before the *Friday* following. On the 9t the *Tueſday* preceding the *Friday*, Mr. *Fordyce* writes.*

He delivered the letter to Mr. *Haariſon* his clerk; he abſconde at four in the morning, and never returned 'till the commiſſion ha iſſued—11 o'clock the commiſſion iſſued; half after 10 the cler called at Mr. *Fiſher*'s, but did not find any at the *office*, called

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* (The letter ſtated by Lord *Mansfield* was nearly this) "Mr. *Fordyce*, con "ceiving that the money lodged with him was a ſum about which perhaps eve "ſome pains had been taken to place it there, and that diſputes might ariſe, give "that preference to Mr. *Fordyce* which he thinks undoubtedly his due." Tw notes, one for 5300l. another for 1700l.

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11 and found no body, but delivered them on *Thurſday*, when *Fiſher took* and has kept them ever ſince, notwithſtanding a *legal* demand.

Whether the property was *duly* and *regularly* transferred (which always includes without fraud) before the actual commiſſion of the bankruptcy? And whether a bankrupt can give a preference to a *bonâ fide* creditor *before* and on the eve of a bankruptcy? Are the two queſtions ſtated.

As to the latter, the ſtating as a general queſtion perhaps, involves a great *impropriety*. No trader can do any thing in fraud of the equality which the laws of his country require: He can't aſſign *proviſionally*; he can't aſſign in *excluſion* of a creditor whom he thinks unjuſt; and if by *deed* contract is not only *void* but an act of *bankruptcy*. If not by deed they are *void* (as in all queſtions upon fraud) againſt thoſe who are prejudiced, however fair between the parties. Wherever the transfer is not *complete*, wherever there is an *executory counter-mandable* action, the act of bankruptcy is a *countermand*, and takes *all* the power out of the hands of the party.

What was ſaid in the caſe of *Worſley* and *De Matto's*, I don't recollect, I have not lately looked; but I think the caſe of *Small* and *Oudley* was *not* meant to be held *not* good law, or *declared* ſo at that time; nor did I ever mean to ſay it could *never* be good.

Suppoſe this in the *regular* courſe of payment.

Suppoſe *legal* diligence is uſed; ſuppoſe an *execution* in the houſe; no fraud but merely a ſuſpicion of a bankruptcy, it might be good.

Cock and *Goodfellow* in preference of the children; was a *fair* act done ſix months *before*; a great loan to her brother of 40,000*l.* ſhe did what the court of Chancery would have *compelled* her to have done.

So far I think the caſe of *Small* and *Oudley* goes, it was a very *favourable* caſe, the ſecurity given only 300*l.* where 1800*l.* *aſſigned*; or if *all* had been aſſigned it would have made an end; for it would have ſtopt his trade.

But I think the caſe *greatly ſhaken* in the Common Pleas.

I think that caſe determines, that though the act is *complete*, yet f the real motive of the trader is a preference in contemplation of ankruptcy, it ſhall be *bad* as againſt creditors.

The trader had a trade in an *upper* and an *under* ſhop. For th purpoſe of carrying on his trade his brother lent him ſeveral ſums an moſt meritoriouſly, as in the caſe here, without intereſt, and ha nothing to do with him in his trade. Upon the 13th of *Auguſt* h makes an aſſignment of the goods in the upper ſhop, he deliver the poſſeſſion *inſtantly*; the brother becomes the *viſible* owner inſtantly; and acts as *ſuch*. The money *all* lent *bonâ fide*; and as ſtated *no ſuſpicion* by the brother of *inſolvency*. But it is found ther was *no* threatening of an arreſt, but a *preference* given. It is foun that there was an aſſignment of *no more* than the one-third, they did not determine upon the diſtinction between *part* and the *whole* but that a *preference* had been given.

This went farther than *any* caſe before, for from the time of *Worſley* and *De Mattos*, it had been ſuppoſed that where the aſſignmen was for the benefit of a fair creditor, and of *part*, and *before actua* bankruptcy it would be *good*; but here an aſſignment by deed, o part in immediate contemplation of bankrutcy, though on a valuabl conſideration and a moſt meritorious caſe, was of itſelf an act o bankruptcy. And upon the ſame principles if without deed woul have been void.

Now ſee the caſe here—A man, with his boots on as I may ſay without *any* demand, nor in performance of *any* obligation, without *agreement*, not ſo much as even in payment of a debt which then wa to be *called* in, (for the ſame friendſhip had made the ſum not *demandable* until *Friday*) ſets up all night, this letter delivered at five and th bankruptcy committed at ſix before it could be poſſibly delivered t the defendant. It falls greatly within the caſe of *Rolliſton* and *Scot* a man in trade directs goods to be booked in the *name* and in th *warehouſe* of his creditor, (which is the common way) and it is certainly for the benefit of the *creditor* to ſay this was *payment*; afterwards he went away; and not until after he declared the intent o booking to have been as *payment*; which *then* could not prevail a the property was *no longer* under his control: Nor did the *bare lodging* of the goods in the creditors name transfer the property befor by *any* implied aſſent.

How is this an appropriation? Suppoſe the ſtock had riſen o fallen, and *Fordyce* by either of theſe contingencies, for I know no which would have ſerved him, had become a *very rich* man, woul *Fiſher* have been obliged to *accept* them, if the drawees, for no faul of his, had become *inſolvent?* What is the letter? It declares tha the view is to give him a preference which has been void even without deed before the act of bankruptcy, and by *deed* would have bee an act of bankruptcy itſelf.

Mr. Juſtice *Willes*—If this caſe had come before the court *immediately* after the determination of *Small* and *Oudley*, I ſhould have had great doubts. But I think that caſe has been much ſhaken by *Worſley* and *De Mattos*, *Hagen* and *Rolleſton*, and lately in this court *Putris* and *Robinſon*; but I think it has been over-turned by the caſe of *Linton* and *Bartlett*.

But ſuppoſe that caſe of *Small* and *Oudley* to be *now* law.

The caſe was a transfer of 300*l.* to diſcharge part of a debt of 1800*l.* but here the payment can't apply to the *general* debt due to *Fiſher*, but muſt apply to the 7000*l.* Can this be ſaid a payment in the courſe of trade? 7200*l.* paid in diſcharge of 7000*l.* I thought it had been upon a calculation of intereſt; but the firſt note is the 7th of *May*, the other is the 2d of *April*; the firſt would become due the beginning of *July*, the other the latter end of *June*.

The *haſte* ſhews it was in contemplation of a bankruptcy; ſhows a preference; ſhows an *illegal* preference.

But ſays Mr. *Dunning*, ſuppoſe this had been paid the *Saturday*, then I think the caſe would have been *good*; but the tranſaction was incomplete as the caſe is 'till after the commiſſion iſſued.

Atkins and *Barwick*, where the mercers refuſed to accept the ſilks.

On the grounds of the four prior deciſions, and the opinion of his Lordſhip, I think it *cannot* be *ſupported*.

Mr. Juſtice *Aſhhurſt*—This is certainly a very *compaſſionate* caſe; but I think there are many caſes which have gone farther againſt preference.

Small and *Oudley* had been an expreſs ſtipulation; and I think, in dread of coercion; and though, I do not mean to overſet the authority, I queſtion however, if it was determined upon *right* principles: For though it was an act of *generoſity*, and if ſucceſsful was for the benefit of the creditors; yet, if unſucceſsful and the ſhop was kept up for a few days, it would draw in probably a *great* many creditors and to a *great* amount.

The act of bankruptcy is in the nature of a *civil* death; and is a *countermand* of *all* treaties not *executed*. The ſervant knew *nothing* of the contents no more than the poſt boy.

Lord *Mansfield*—I forgot to mention in that caſe in *Strange*; the judgment ſeems very right, though the reaſons wrong. The traders very honeſtly refuſed the goods, and would not enter them in the books, but ſent them back.

Diſtinction between intentional and conſequential preference.

A vaſt deal turns upon the principle whether the *ſole* motive t the act is a preference; or whether done without that motive, b *conſequentially* gives a preference: There he is entitled as a trader, t the time of his bankruptcy, to do what any other trader may do. I the caſe of *Small* and *Oudley*, the money having become due, if h had paid it immediately (though thereby he would have done wha he knew he could not do afterwards) I don't ſee it could have bee overſet as being in the way of trade. I am very ſorry for the defendant, but I don't ſee *it can* be determined otherwiſe, and therefor POSTEA muſt be returned for the PLAINTIFF.

Curia Cancellaria.

Beckford *againſt* Beckford.

ON an appeal from the Maſter of the Rolls—This was a que tion ariſing upon a deputation procured by the late Alderma *Beckford* for his *natural* ſon, on a ſecurity of his eſtate in *Jamaica.*

The point was—whether this was a deputation for his own uſe t take the profits, or in truſt for his father.

The value was 800*l.* *per annum*, during a term of ſeven year one of which was expired in the life of his father.

It was contended it was too great a proviſion to be made for natural ſon.

He gave him by his will 5000*l.* beſides, and an expectancy aft the death of fifteen or ſixteen perſons without iſſue, of coming i as general deviſee of the reverſion.

Evidence admitted, to explain the intention as of an abſolu gift in favour of the ſon, and that the ſon took the profits to his ow uſe in the life time of his father, and has continued ſo to do ſinc his deceaſe. But the ſame witneſs on croſs interrogation depoſe that the father was diſpleaſed at his ſon refuſing to go to *Jamai* upon former propoſals, and ſaid, "If he thinks he can do better f "himſelf than I for him, let him."

And on behalf of Mr. *Beckford* it was contended, that his fath had ſufficiently manifeſted his affection by a preſent legacy of 5000 as already mentioned, and the reverſionary intereſt in the *whole* give under his will. That what he was now to contend for was only a

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annual profit of 800 *l.* for *ſix* years remaining of the term, out of the *immenſe* fortunes of his father, who by the largeneſs of his fortune and contingent bequeſt had made it evident that he meant the benefit of his ſon; and not to leave him in a ſo much worſe condition than the reſt of his children, as he would be if he was to ſit down with the 5000 *l.* only; and the remote poſſibility of partaking of the future bounty of his father, as heir to the reverſion of not leſs value than 30,000 *l.* a year. And when he looked forward towards providing him with ſo vaſt an eſtate, it could not be ſuppoſed that he intended to mock him, with this gift which he had given him, and under it ſeen him in the actual enjoyment of the profits.

That he is not made a party to the deed as by way of truſt, but expreſsly named as deputy in the indenture; that if it had been a common leaſehold eſtate he would have been entitled to the rent, if a copyhold to the *profits*, and in this caſe to the profits of the *office*.

Thus he ſtands *legally* entitled, and *primâ facie equitably* entitled; let us now ſee whether there is any reaſon to *diſentitle* him in equity.

His ſon had refuſed to go to *Jamaica* on propoſals of his father. If it be ſaid the father altered his intentions on this refuſal; (and thoſe very propoſals are evidences of affection and deſire for his advancement,) but if it be ſaid he had altered his intentions, then why name his ſon deputy in this inſtrument, on the effect of which the queſtion ariſes; when he had his other ſon preſent on the iſland, his own agent preſent on the iſland? It cannot be ſaid becauſe it was a better life, for the eſtate was for ſeven years, determinable only on the death of Sir *N. Herbert*. Nor could it be becauſe he was to go over to execute his office; for he had refuſed it upon the ſuppoſition.

That upon the evidence it appears the father had intended the proviſion for his ſon.

As for the diſpleaſure of his father and the words ſaid to be ſpoken, will a court of juſtice from thence infer the father meant to *reſume* what he had given (and what he had even no right to reſume) the legal eſtate, and take it to himſelf. He might waive the appointing him agent, which the ſame evidence ſays he had intended.

Can a man ſuppoſe that a father who by one will had left him 10000 *l.* by his other will 3000 *l. per annum*, by his now will 5000 *l.* only; ſhould mean to revoke the *legal* eſtate which he had procured him, and convert it into a *truſt* for *himſelf*?

That it is againſt all the rules of evidence (eſpecially where ſo near a natural relation is a party) to admit of *parol* evidence to diminiſh,

niſh, and not only ſo but to take *away* the eſtate given, and to tak away an abſolute right, declared and *veſted* by deed, and *executed* b *actual* poſſeſſion: And this above all from circumſtances not *conc mitant* but *ſubſequent* to the deed. That there is ground of reaſo law and natural equity, to continue the *legal* and *equitable* eſtate i the ſon, where the father had placed, where the law had conveye it; but no ground of equity to preſume he was only a *truſtee.*

Where an eſtate has been purchaſed by another perſon for a *ſtra ger*, the court will require *clear* evidence of the payment of t money by that perſon, to whoſe uſe the purchaſe is contended have been made; but they will not here ſeparate the equitable a legal eſtate, nor take away the beneficial intereſt by any implicati on parol evidence, which the ſtatute of frauds was meant to obviat

On the other ſide Mr. Attorney-General.

Lord *Nottingham*, in the caſe of *Grey* and *Grey*, held that con deration of blood was a ſufficient conveyance to a ſon named in t deed; but that of a *ſtranger* it was otherwiſe: That there is no ca to prove that an illegitimate ſon would be in any other ſituation th a ſtranger; and even the *primâ facie* evidence on behalf of a le timate ſon may be *rebutted* by circumſtances.

The perception of the profits during infancy has been taken guardianſhip; the perception of the profits afterwards by the fath has been taken as evidence to rebut the ground in equity, whi otherwiſe would be in behalf of the ſon, but ſtill there might evidence to control even *this.*

But where the truſt is not declared to him in the deed, where t ſon thus circumſtanced, where the father took the profits (for p of the time at leaſt) equity never conſidered a perſon as other than truſtee.

Hill and *Barrow* was the ſtrongeſt caſe, but the father and there were joint obligators in the bond, and Lord *Hardwicke* it might be a fraud upon the marriage to conſider it otherwiſe.

Note, As I underſtand the Lord Chancellor decreed that the took to his own benefit, and not in truſt.

Truſt.

TRUSTEE for children under a marriage ſettlement, w was to take the beſt ſecurity, takes *perſonal* ſecurity, lodges the money in the hands of a banker without taking bon for money of his own he took bond: The banker fails. Thi *groſs* negligence in truſtee and ſhall make him liable, and it is

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excuſe to ſay he could get no good mortgage ſecurity; for then he ſhould have placed it on *public* ſecurity.

Action at Common Law.

For ſeducing away a Journeyman per quod the Maſter ſervitium amiſit.

SHOE-MAKER employs a man to make up ſhoes for him, and retains him by the piece; and this perſon being hired by another, and leaving his ſervice, the work unfiniſhed, the ſhoe-maker brings his action againſt the perſon ſo hiring, for inticing his ſervant out of his ſervice. Such perſon is a ſervant of the ſhoe-maker, (though not within the particular proviſion of the ſtatute of *Eliz.* concerning ſervants to be hired for the year,) ſo that an action at common law will lie for ſeducing him from the ſervice.

On a *ſpecial verdict*, the jury found the man employed a *journeyman* of the plaintiff's; but *not* for any *certain* time.

They found alſo he was hired by the piece.

They did not find particularly whether the perſon who hired him knew of his being retained by the plaintiff at the time of hiring.

Queſtion: Whether this perſon be a ſervant of the plaintiff, ſo that he may maintain an action and recover damages, on his being enticed from his ſervice? And whether there is ſufficient upon the verdict to entitle the plaintiff to recover.

Argued: That this is a caſe *entirely* at *common-law*; and not upon the ſtatute which requires the ſervant, for the abduction of whom from his maſter's ſervice an action may be brought, to be a ſervant for a time *certain*.

But ſtill, that wherever there is an injury the law will give a remedy; and the enticing away a ſervant *neceſſarily* infers damages, and *wrongful* damages.

Brooke cites a caſe in the Common Pleas in his 38 page, that for taking away a ſervant by *force* an action of treſpaſs, *vi et armis*, would lie; for ſeducing a ſervant from the ſervice an action on the caſe; but that if the ſervant left his maſter *voluntarily*, an action lies only on the ſtatute.

Brooke, title Labourer. If a labourer quits me voluntarily, *no* action; but if any *ſeduces* him, action on the caſe.

Leon. 140. 11 *H.* 4. *p.* 17. cited.

As to action at common-law there is no exception to be found, which ſays, that in order to maintain ſuch action, the ſervant muſ be a ſervant for a limited time.

The act of 5 *Eliz. c.* 4. ſays, *no* perſon ſhall be hired for *leſs* tha *one year*; and ſpecifies ſhoe-makers; but this is only to provid againſt the *voluntarily* quitting of the ſervice before the time, an not againſt *ſeduction* from it by another.

Fitz Natura Brevium 395. If a man take a ſervant out of m cuſtody, he is liable to an *action*.

That the defendant *knew* the perſon to be a journeyman of th ſhoemaker he has not denied; it muſt therefore be taken as admit ted, and the jury do not ſay that he did *not* know.

That as to the objection of time if it were neceſſary to go into i certainly an hiring without *any time* particularly mentioned is a re tainer for a *year*.

On the other hand, that the facts found by the jury are not ſuffi cient to ſupport the declaration, for that the plaintiff declares tha he retained the two perſons ſtated in the declaration, to ſerve him a his journeymen in the trade and buſineſs of a ſhoe-maker; and tha the defendant, well knowing of the premiſſes, and intending to de fraud and prejudice him in his ſaid buſineſs, craftily and maliciouſl did *ſeduce* the ſaid perſons, and *inticed* them from his ſervice; *whereb he loſt their ſervice* to his damages, &c.*

The jury find no hiring nor ſervice of any determinate time.

That the jury do not find the defendant *well knowing* of the pre miſſes, &c. did entice, &c. and that this is very *material*.

That where there was no hiring at all there could be none for year.†

That the plaintiff had ſtated *no* agreement to keep theſe journey men in conſtant work; or that they were his *ſervants*.

Lord *Mansfield*—How do you *define* the word journeyman.

Anſwer: That it was apprehended to mean no more than a ma who was out of his time and was not maſter.

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* The jury I ſuppoſe found generally for the defendant as to the one of the perſons.

† Omne majus continet in ſe minus; et qui negat totaliter partem negat.

Anſwe

Lord *Mansfield*—Does not a journeyman imply the particular relation of ſervant to the man? He might work for a month at once.

Anſwer: My Lord, it would have been ſo if the jury had not found that he worked by the piece, and not for a certain time; ſo that they have found what ſort of a journeyman: And whether, under theſe circumſtances, he were a ſervant, they ſubmit to the court. We truſt that the court will be of opinion he was not, or, at leaſt, that the facts found are not ſufficient for the plaintiff to recover.

Lord *Mansfield*—This is apparently a *ſervice.* They have found *expreſsly* he was taken by the *piece:* And this is a *ſufficient retainure.*

Journeyman, I apprehend, in the original *etymology,* is a ſervant for the *day*; in whoſe ſervice the maſter has certainly an *intereſt:* And they find defendant inticed this ſervant to leave the work he had undertaken *unfiniſhed.* And it is very truly obſerved, that *many* ſervants are taken to work by the piece; if *otherwiſe* they would often be *idle.*

It juſt lies upon the circumſtance of his being found a *journeyman*; otherwiſe it might have been that the maſter took any who pleaſed to work for him, to ſtay as long as he pleaſed, and *go when* he pleaſed.

The counſel was going to have ſaid, that he did not lie or victual in the houſe.

Lord *Mansfield*—This would have been ſtrong evidence, on the trial, to have perſuaded the jury not to have found him a journeyman: But they *have found* him ſo, and it *muſt* be taken accordingly.*

Mr. Juſtice *Aſton*—From the general inconvenience that would otherwiſe ariſe, the ſervant muſt be retained by the piece, to a very vaſt amount. And that the ſtatute had provided impriſonment, but no action, which ſhewed they recognized every man's right to his action. Every man is entitled to one who has ſuſtained damages by *wrong:* Therefore, if a ſervant be *retained* for any ſpecial work, and *departs* from this *unfiniſhed,* an *action* will lie againſt any who *ſeduces* him to *depart.*

JUDGMENT for the PLAINTIFF.

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* Res judicata pro veritate accipitur.

Damnum ſine injuria eſſe poteſt; injuria verum ſine remedio nequaquam poteſt.

Curia

Curia Communium Placitorum.

WRIT OF RIGHT.

Tyſſen, Lord of the Manor of Hackney, *v.* Clarke.

THE court being ſeated, the recognitors of aſſize were calle Four knights appeared, and choſe to themſelves twelve other which, together, compoſed the grand aſſize of *ſixteen* jurors.

The oath adminiſtered was in this form:

I do ſwear that I will ſay the truth, whether George Clarke *ha more* mere *right to hold the tenement, of* Francis J. Tyſſen *demand againſt him by his* writ *of* right, *or the ſaid* Francis J. Tyſſen *to hi as he* demands, and for nothing to let to ſay the truth.

So help me God.

And now, upon the motion of Mr. Juſtice *Blackſtone*, *order* w made by the reſt of the judges, that the *galleries* of the *court* *open* for the *admiſſion* of ſtudents of the ſeveral inns of court.

The *door-keeper* not immediately appearing, and it being appr hended that he meant to take advantage of the *public curioſity*, extorting fees for admittance, Mr. Juſtice *Blackſtone* ſaid, he remem bered when a gentleman, a *counſel*, had given a quarter guinea f *admittance*, the *court* was about to *commit* the *officer:* But he adde I believe, on his aſking *pardon*, and deſiring to reſtore the mone at the interceſſion of the gentleman, the court did not *commit* him

The *record* was ordered to be read, and then the *junior ſerjea* for the tenant, in the *aſſize* of *right*, had notice that he was to *b gin*, after the *record* ſhould be read.

Chairs were ordered to be ſet for ſuch gentlemen as had not *roo* in the *gallery*.

The *record* was then read, to this effect:

Middleſex to wit, Francis J. Tyſſen, *by his attorney*, *deman of* G. Clarke, *eſquire*, (reciting the premiſſes) *and ſaith, th his anceſtor was ſeiſed in the time of* peace, to wit, *in the time of o late Sovereign Lord* George —— *by taking* eſplees, &c. *and di thereof ſeiſed: Whereupon, on his death, the ſaid premiſſes, in his ſa*

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writ of right demanded, deſcended and came to the ſaid Francis J. Tyſſen, *as ſon and heir of the ſaid* Francis Tyſſen, *who thereby became lawfully ſeiſed thereof, as in fee, till he was thereof diſſeiſed by the ſaid* G. Clarke, *under colour of a certain leaſe, within ſixty years of the time of bringing the ſaid writ. Whereupon he putteth himſelf on the country, and the ſaid* G. Clarke *doth the like; and thereupon iſſue is joined.*

Mr. Serjeant *Walker* opened for tenant—That the father was ſeiſed, &c. and that, after the deceaſe of the father, the lands deſcended to the ſon, &c. And, *gentlemen* of the grand aſſize, it is yours to enquire whether *tenant* or defendant have the better right.

I, who am of counſel for tenant, maintain that he hath the *better right*.

Serj. Davy. On the ſame ſide—The caſe is briefly thus; the tenant's father purchaſed the eſtate, or was rather mortgagee of it, in 1736. And took a mortgage in fee, in conſideration of 1000*l.* paid to the mortgagor, *Oſbaldiſton*; which mortgage was regiſtered, and ſtood unimpeached till a late action: In which, counting on the ſeiſin of himſelf, he was barred by a thirty years poſſeſſion againſt him, and driven to this writ.

Purchaſe of the equity of redemption.

In 1742, *Clarke*'s father purchaſed the eſtate in *fee:* And in the deed of purchaſe there were the uſual covenants that party had a right to convey, and for quiet enjoyment, &c. and covenant to levy a fine, which was duly levied *Michaelmas* term, 16 *G.* 2. 1742.

A deed-poll, to which *Oſbaldiſton* and the tenants of the premiſſes were parties (the tenants for the ſake of attornment.)

Title commencing in 1736, completed in 1742.

In 1706 Sir *Edward Northey* was ſteward of this manor.

He iſſued precepts to the cuſtomary tenants, to repair to the waſte, and there to ſet out, by *metes* and *bounds*, how much may be *encloſed, holden* and *enjoyed* by *J. Flanders*, to his *own uſe*, without any prejudice to the other *tenants*, or any other her majeſty's *liege* ſubjects paſſing that way.

To this, which was in the nature of an *ad quod damnum*, the tenants return that they, the underwritten, have *viewed*, and *return* *how much* the ſaid *J. Flanders might encloſe*, with the *liberty* of the *lord* of the *manor*, and *conſent* of the *tenants*.

Provided always, that the ſaid J. Flanders, *his* heirs, *nor aſſigns*, (which the court will tell you are applicable only to tenants in fee) *ſhall not build any thing that may prejudice or foreſtall the houſe he holds of Mr.* Halſton, *his* heirs *or aſſigns*.

And this they return as a *good return* to the precept.

This is returned by the cuſtomary tenants, and ſigned, not by them only, but by Sir *Edward Northey* himſelf; who would never have ſuffered this return to the precept to be made, unleſs it had been a *good* return, and not injurious to the rights or intentions of the lord.

How, it may be ſaid, does this apply? If there was this eſtate out of the demandant, Mr. *Tyſſen*, more than ſixty years paſt, the tenant who defends needs not ſhew his title farther, but the action is *barred*.

Court—There is no diſpute about the *identity* of the premiſſes; what is the quantity?

Anſwer—Rather more than an acre, with ſeven houſes.

Title of *Oſbaldiſton*.

Deed of leaſe and releaſe in 1736, on the 26th of *February* was pleaded as part of the tenant's title. It imported to be between *Oſbaldiſton* and *Clarke*, the father of the tenant in this *writ*, in *conſideration* of 1000*l*. Releaſe of eſtate in poſſeſſion of *Oſbaldiſton*, the leſſee, reciting the dimenſions, to *G. Clarke*, his heirs and aſſigns, for ever, with covenant of right to convey the eſtate in *fee ſimple abſolutely*, and the ſame to protect *indefeaſible*, and *without incumbrances*, except a quit-rent of ten ſhillings *per annum* to the lord of the manor. And all the ſaid within recited premiſſes are, by the ſaid deed, releaſed, granted, and confirmed to the *uſes*, *truſts*, and *purpoſes* therein mentioned; namely, to the uſe, *&c.* of the ſaid G. *Clarke*, his heirs and aſſigns, for ever.

Proviſo, that on payment of mortgage-money at a certain day, principal and intereſt, the ſaid *G. Clarke* ſhall *reconvey*.

Certificate of *inrollment*, according to the ſtatute.

Bargain and ſale 30th *December* 1742.

Leaſe for years not endorſed.

The deed of bargain and ſale recites the mortgage-money unpaid at the day, and the whole principal and intereſt due 1280*l.* beſides 220*l.* ſince due, after the ſaid mortgage (receipt whereof is indorſed for the ſaid 220*l.* on the back of the deed) and the condition being become abſolute of the deed of mortgage, the mortgagor bargains and ſells to the morgagee, for fuller confirmation of his title in the ſaid premiſſes, all his eſtate, title, intereſt, equity of redemption, claim or demand whatſoever, to the ſaid *G. Clarke*, the mortgagee; and for farther aſſurance covenants to levy a fine.

Fine ſur conceſſit thereupon. Note of the fine read. Proclamations: Theſe were not read; for the court preſumes a fine to be with proclamations, till the contrary be proved.

Vide Hitchen *and* Baſſet.

The tenant is ſon, and heir at law to the ſaid *G. Clarke*.

The tenant called witneſſes to prove his title, and I took a long note of the evidence, which, as far as is not matter of law, I omit.

On the other ſide, for *Francis J. Tyſſen*, who brings this aſſize as *demandant*, to recover his right to the premiſſes.

Gentlemen of the grand aſſize, I hope I ſhall ſhew, to your ſatisfaction, as concerning the premiſſes in queſtion, that they belong of right to *F. J. Tyſſen*, and that he has more *mere* right to *demand* than the *tenant* hath to *hold* them, and has a much ſuperior right to that claimed by the *tenant*.

My brother *Davy* has *admitted*, that in 1736 the claim originally ariſes. He, knowing always what is beſt for his client, would have ſtopped there, but aſking a direction of the court, and they not chooſing to give him one to ſtay there, he proceeds to ſhew a title, as he ſays, in fee, out of the lord, and in a third perſon, as far back as 1706. But all that appears then is, that the *fee* was in the lord with a licence to encloſe with the conſent of his *tenants*.

As to the ſubſequent conveyance, no proof of payment, but as between the parties; but if a *real* tranſaction, ſtill I ſhall contend it was not ſuch an one as can prejudice the title of the lord, on account of their iniquity.

I mean to ſhew that *Oſbaldiſton* was only a tenant to demandant; and I dare ſay none of you, gentlemen, take the trouble of ſending to the regiſter, to ſee whether your tenants have done as *Oſbaldiſton* did; taken upon themſelves to convey in fee when they have on a term eſtate.

The demandant claims as lord of the manor, where he and h anceſtors have immemorially uſed to have the waſte; and the pr miſſes in queſtion are and immemorially have been parcel of t waſte.

Mr. *Tyſſen*'s grandfather died in 1710, father in 1717; and th demandant himſelf was a *poſthumous* ſon.

Within this manor there hath *immemorially* been a cuſtom for th lord of the manor, for the time being, having a deſire to grant an part of the waſte, under a certain rent, to iſſue precepts to the te nants, to enquire whether the ground may be encloſed without pr judice. Theſe are generally forty or fifty years leaſes, to encourag tenants to improvements. I ſhall ſhew a great number of theſe pr cepts; and there never was an inſtance of a precept made to conve in *fee*.

The intent, I ſhall ſhew, was only to grant for a term of forty one years, from *Michaelmas* then next enſuing.

My brother *Davy* has ſaid, that had it not been the intent of th lord to grant a fee, Sir *Edward Northey* was ſo very learned and ac curate, that he would not have ſuffered any thing ſo improper in hi office as words to be uſed and ſigned with his name; which impor my brother *Davy* ſays, a conveyance in fee to have been intended But I am afraid none of us now at the bar are ſo extremely accurate nor was Sir *Edward Northey*, or any man, always aware, and *a ways* in the *right*. At moſt, it's no *proof* of a conveyance in fee and goes no farther than evidence of ſuch a thing in agitation.

J. Flanders died inteſtate, leaving ſeveral brothers, in 1720; th widow took out adminiſtration, and became *entitled* to *all* the *per ſonal* eſtate, and took this amongſt the reſt.

She made a will in 1721, reciting that her late huſband, by con ſent of the lord, had built four ſmall meſſuages on the waſte, i the place in queſtion; and ſhe directs them to be ſold by her execu tors. She makes *R. Oſbaldiſton* and *R. B.* her executors.

And, by a codicil dated 28 *July* 1725, ſhe revokes that part o the will, and appoints *R. Oſbaldiſton* her ſole executor.

Oſbaldiſton came in *as executor*, paid the ten ſhillings *rent*, which had been paid all along: He himſelf paid it the firſt year. The de-

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mandant was then in his minority; the receivers charge themſelves with the receipt. I ſubmit to my lord, the receipts even of a common bailiff are evidence when he charges *himſelf*; much leſs can there be a queſtion in this caſe.

Under theſe circumſtances the tenant, *Oſbaldiſton*, makes the conveyance. This even, as by a tenant for life, was *fraudulent* and *void*; and good for nothing, but as by way of eſtoppel between the parties.

Though my brother *Davy* would avail his client as a fair purchaſor, *without notice*, I apprehend this will not ſerve him. Indeed he rather recommends his client upon that ground than pretends to avail himſelf of this ſuppoſed circumſtance as a ground in law. If this were upon an equitable queſtion it might have been a ground; but we are *now* on the *mere right*: And you are to find *only* upon a *ſtrict legal* eſtimation which has the *greater right*. Though, upon the circumſtances, it does not appear (if it was at all material) that there was *not* fraud; but the contrary: For it is far from evident that the tenant came in as a *fair* purchaſor.

I rely, therefore, that I have ſhewn a *better* and *ſuperior*, and more *ancient* title, whereon, in juſtice to your *oaths*, you will find for the *demandant*.

Witneſſes called for the *demandant*.

E contra for the tenant, in replication—That as to the obſervation, that it had always been *cuſtomary* to grant term eſtates in the waſte of the manor, but *never* in *fee*, the right of a perſon claiming under the lord of the manor, by his grant, ſhall not be *prejudiced* by any *cuſtom* of a manor. He ſhall never *qualify* his *own* grant made, in any *ſingle* inſtance, in *fee*, by any *cuſtom* which has obtained in the manor. Now here, I ſubmit, there is evidence of a *fee* granted, by the precept and return.

Court—You have not *ſhewn* the *precept*. However, the *recital* of it on the return is ſufficient for your argument.

I contend then, my lord, I have brought *evidence* of a grant in *fee*: And what ſays the lord? "It has been *uſual* for me and my "anceſtors to grant otherwiſe."

For the demandant—I do agree, if you had produced a grant in *fee*, the lord cannot *qualify* his own eſtate. But if you produce *preſumptive* evidence upon the *præcipe*, I only deſire to ſhew that the effect upon that *præcipe* has *only* been a *leaſe* for *years*.

E contra Serjeant *Davy*, for the tenant—That from the time the return of the *præcipe*, in 1706, to 1736, it does not appear a way how *poſſeſſion* ſtood: But thence there appears a poſſeſſion und a ſuppoſed tenancy in *fee*, againſt the lord. And he repeated th the words "*heirs* and *aſſigns*" are *not* applicable to leſs than a *fee*.

Lord Chief Juſtice *De Grey*—I own, for myſelf, I have *no dou* of the competency of the evidence. The lord is found out of po ſeſſion, except by taking the rent a part of the time. I take th poſſeſſion, for the preſent, to be as upon the return.

It was very properly compared to a writ of *ad quod damnum*, an will have the ſame effect. I don't ſpeak what weight it will ha with the jury, as preſumptive evidence. When this writ iſſues, an the jury make a return, this does not amount to a grant.

It is not *collateral* evidence which is here offered, to *avoid* an *actual* grant, but evidence to explain a doubtful matter, and to ſhe upon the cuſtom, (of which we muſt underſtand this *præcipe* an return to be part) that no greater eſtate has been *wont* to b granted; and then the farther evidence will come out.

Mr. Juſtice *Gould*—I think it *material*—I think this cauſe woul be *cloſed* by this evidence. I take it that this is not *now competen admiſſible* evidence. It appears *J. Flanders* was in poſſeſſion of particular ſpot of ground, and wanted to acquire more: And ther is evidence, as Serjeant *Davy* obſerves, that he was intended to tak a *fee*. Confining ourſelves to the *inſtrument*, and not going into th extrinſical circumſtances, by *conjecture*, we find they had in contemplation to grant a *fee*. I apprehend this is evidence. From th year 1706 there has been an enjoyment of *J. Flanders*, and tho deriving under him ever ſince. This I take to be evidence whic amounts to *proof* of above *ſixty* years poſſeſſion under a conveyanc in *fee*. If this were an ejectment, twenty years poſſeſſion woul induce the bar; and here, where the poſſeſſion has ſtood for abov *ſixty* years out of the lord, I conceive preciſely the ſame inferenc will ariſe.

This is not properly a *cuſtom* as a foundation of a perſon's *title* but it is *uſage* only. And as *every man's grant muſt be taken mo ſtrongly againſt himſelf*;[*] and it is *not* pretended the lord *might n* grant a *fee*, therefore I think *preſumption* on *uſage cannot* be ſet u againſt it.

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[*] Verba fortius accipienda contra proferentim.

Mr. Juſtice *Blackſtone*, *contra*—That the return was only *preſumptive* evidence of the grant of a *fee*; againſt which other *preſumptive* evidence might be ſet up. The *ſteward*, by his ſigning, does not give any aſſent to the propriety of the return; and the men who made it were *ignorant* men, and *falſe grammar* and *bad ſenſe* are in the outſet. To the *preſumptive* evidence of a grant in *fee*, may very properly be ſet againſt it *preſumptive* evidence of a grant for *years*.

Mr. Juſtice *Nares*, *contra*—I wiſh they would have gone farther, which would have taken away my brother *Gould*'s doubt; but, on the preſent ſtate of the queſtion, I think there is *no ground* to *admit* the evidence.

Lord Chief Juſtice—I think it very proper to let in a preſumption. The lord grants a power to grant to *Flanders*: This is *not compulſory* on the lord; it is *only executory*, and the lord *may* or may *not* make ſuch a grant in future. Does it appear *executed?* Is there any *rent reſerved?* Any thing *concluſive? No:* But they ſay evidence of poſſeſſion, conſiſtent with the grant, is *concluſive*. But what is the evidence? It will apply to poſſeſſion in fee; it will apply to poſſeſſion of a term: *Percipitur ad modum percipientis*. There is to be ſure a *faint preſumption*; but there ought to be ſome evidence of *conſtant* poſſeſſion. Then where is the difference if they go on and ſhew the inſtances, that on ſuch a precept the uſual way is, to grant for *years beneficially* for the lord. And it is indeed very ſtrange that the lord ſhould grant in fee, *without reſervation* of rent or ſervices.

Mr. Juſtice *Gould*—I only deſire to be underſtood. My ground is on the poſſeſſion, of which my Lord *Holt* ſays, twenty years *makes* and *proves* a ſeiſin in *fee* upon ejectment; and ſo ſay I: And, therefore, I ſay *ſixty* in an aſſize.

Preſentment given in evidence on a *præcipe*, to ſet out waſte tenement to *A. et hæredibus*—no condition added.

Counterpart of the leaſe upon that return; the lord leaſes out for years. This ſeemed to be deſigned to empower the lord himſelf.

Evidence of applications to renew leaſe on ſurrender of the old.

16 *Dec.* 1661. Return. Queſtion, whether original return; ſteward examined. He was aſked, whether it appeared on the books? No; there were *no* books farther than *May* 1661. Which book begins 1658.

4 When

When does the chaſm begin?—From *May* 1661, and en 1664.

Is this an *original præcipe*, though it does not appear in any boo

I believe it is a copy.

Have you ſearched whether there are more books, with prop diligence?

I can't ſay I have.

Where did you find the papers?

Delivered with other leaſes.

Beſides this, ſaid the court, there is a record of a return, ſign by the ſteward himſelf, ſtating return how much he may convert his own uſe. No words of *heirs* or aſſigns.

Indenture of releaſe between the lord and cuſtomary tenants, citing the preciſe term, from *Michaelmas* 1751; year's rent 6*s.* 8

Court—Are any of the leaſes entered upon the court books?

Anſwer—No, my lord.

Nor any memorandum?

No, my lord.

Return ſets out waſte, with dimenſions; leaſe 28 *December* 17 This an approvement.

It was obſerved by the court, how important it was, as well *juſtice,* as for ſaving of *time,* to have had the books. Returns ſta at the diſtance of ten or eleven years from one another; and it d not appear how many *intermediate* licences there may have been *fee.*

The learned Serjeant vindicated himſelf, as not having been tained till the day before the trial.

Leaſe granted before the court day, which was held 18 *Ap* 1707.

Retur

Return. Waſte of the manor, view, and ſetting out by mites and bounds. How much the lord may incloſe for his own uſe, by conſent of the cuſtomary tenants. Houſe in the occupation of *G. Clarke.* Indenture 1706.

A term of forty-one years granted.

Another term of ninety-nine years granted, in the waſte, at the yearly quit-rent of 3 *s.* 6 *d.*

The will of *Catharine Flanders*, in 1726, read.

The court obſerved, that it could not be much relied on what the expreſſions were in ſuch wills; but that ſhe did not conſider this eſtate in queſtion as *perſonalty:* For ſhe gives the houſes in caſe her *perſonal* eſtate ſhould fail.

Anſwer—That ſhe did not take his goods for perſonalty; for ſhe couples them with the houſes, in the ſame clauſe. And at leaſt the meaning may be, my *other* perſonal eſtate.

Oſbaldiſton, the grandſon of *Oſbaldiſton* who conveyed to *Clarke*, examined.

Have you found any leaſe amongſt your father's papers?

Anſwer—Yes; I have.

On being called on to produce it, he produced the draught of a leaſe.

Serjeant *Davy*—Queſtion, whether what they offer in evidence is admiſſible, to prove any leaſe?

Firſt, If a paper were to be read coming from a *grantor*, on valuable conſideration to impeach the *grant*, it would be *very bad.* And next, ſuppoſing this draught were evidence, it is evidence only of an intention to leaſe. This is not a *copy*; but a *draught only.* Even if it were a copy I ſhould take objections: But it does not import to be a *copy* of a leaſe ever *made*, or even *meant* to be made.

They ſay there is a counterpart of a draught; I know not on what evidence: But take it ſo, and it only proves no ſuch leaſe was ever executed; for then why keep the draught.

Serjeant *Hill*—I ſubmit, my Lord, we have already given evidence ſufficient to ſhew ſome leaſe or other: And I apprehend the queſtion is, not whether a grant in *fee*, or a *leaſe*; but what *kind* of *leaſe* For that there has been *ſome* leaſe, of *ſome* kind or other, is plain for it has gone in a courſe in which it could not otherwiſe have deſcended to *perſonal* repreſentatives, and not to *heirs*.

Rent has been paid, it appears from their *own* inſtrument: An no pretence of it's being a *quit-rent*.

That perhaps this was a copy, and not a draught of a leaſe.

That the loſs of a deed could only be proved by probable circumſtances *collectively*, and not by *poſitive direct* evidence in general That the leaſe, having been carried, with other papers, during a lon minority, backwards and forwards into the court of Chancery, migh *probably* be *loſt*.

If loſt, the beſt evidence will be received of the leaſe which th caſe admits. That here there was evidence of hand-writing, an ſufficient proof of execution, from the manner of poſſeſſion, an courſe of deſcent.

Serjeant *Groſe*—That the paper was admiſſible, according to th rules of evidence, whatever weight it might merit.

That undoubtedly it was admiſſible, on proof of the loſs of th original.

2dly, That, it being an ancient tranſaction, loſs would be preſumed when the courſe and nature of the poſſeſſion ſhewed that i muſt have been as of a chattel *real*, and not an eſtate of *freehold*.

3dly, That it might be good to rebut the preſumption of an eſta of freehold; though it might not, of itſelf, have been good to eſtabliſh an original demand.

That, on all hands, it muſt be admitted, the *preſumption* of leaſe is open; becauſe the *demandant* has not made good his title, b ſhewing a conveyance in *fee*. That, therefore, ſuch evidence mu be produced in a dark caſe, to maintain probability upon circumſtances, and try what light can be had.

The evidence will apply to all he has offered: For it proves a leaſt a leaſe intended, but not *executed*; which is juſt the caſe o the grant in *fee*, which he claims on the precept and return, whic are only *executory*, and not evidence ſufficient to prove a grant executed. And where there is only *preſumptive* evidence of a freehol this will go to *repel* that *preſumption*, by ſhewing there was a communication about a leaſehold; and then the obſervation will appl

n it's *full* force. They ſay words have been uſed in what only im-
orts an *intent* to grant; words only good, ſay they, to paſs a *fee*.
We ſhew an *intention* againſt that argument, which preſumes an in-
ent to convey a fee, by giving evidence of an intent to grant a leaſe.
And it will have weight, that it is the *only* paper which appears, in
his cauſe, to ſhew a grant of *any* kind made or intended in conſe-
uence of the *præcipe*.

Serjeant *Davy*—My learned friend ſeems to miſunderſtand the
rounds of the objection. The rule of evidence is, (I mean to rea-
on upon the ſuppoſition of the facts, which they will prove after-
ards if it be neceſſary) that every thing ſhall be proved by the *beſt*
vidence which the nature of the caſe will admit. Books of an at-
orney, memorandums of an attorney, have been admitted in evi-
ence, even of a recovery: But inferior evidence *never* was admit-
ed in proof of a fact, *not done* at the time, but *ſubſequent*, not at
ll neceſſarily dependent on it; and, for any thing that appears, if
t ever did exiſt at all, ſtill proveable by evidence of itſelf, and from
he nature of the evidence brought to prove it, as well as from the
vidence on the other ſide, unlikely ever to have exiſted.

Court—That the ground was laid down too largely; for that
raughts have been admitted in proper caſes.

Serjeant *Davy*—My Lord, I did not mean to ſay that evidence of
a draught was inadmiſſible; but only that it never went alone to
rove. And that here, as to proof of intention, it proves nothing;
or it does not appear which party produced, or which rejected it.
That it would be *irrelevant*: That the ſearching for the leaſe, and
not finding it, would never go to prove it's exiſtence: That it rather
concluded it *never* was.

Court—To prevent the failure of juſtice, the law has laid down a
ule that no one ſhould ſuffer for what he cannot help.

But in order to give evidence of an inſtrument as loſt, you muſt
rove ſuch an inſtrument did once exiſt; you muſt prove *contents*;
and you muſt prove *deſtruction*, or *loſs*.

V. Leyfield's caſe. Co. Rep.

But it is not neceſſary to prove actual preſent exiſtence by the deed
itſelf; (which, if you could do, you would generally prove *contents*)
but you muſt give reaſonable ground to the court to believe it's *once*
exiſtence. Neither need you prove authentically the contents; for
that would imply power of production.

It was alſo ſaid, that if this was an independent queſtion, it
would not be right to admit the bare draught to prove a leaſe, of
which there was no evidence that it had been loſt, or even that it

ever had exiſted. But that here rent paid had been proved; enj
ment proved as under a leaſe; and that the eſtate had been appl
as part of the perſonal aſſets.

That correſpondent inſtances had been produced of many lea
granted on building terms, and no evidence hitherto on the contra
of a *fee* having paſſed. Evidence that there *poſſibly might be*,
evidence that there *was*.

That there ſeemed to be a caſe where evidence had been refu
of an inferior nature, becauſe the party applying had not made
ſearch in the archiepiſcopal court of *York* for the *proper* evidence
that cauſe. But that here it had appeared that the ſame ſearch h
been made in the court of Chancery, and no counterpart has be
found. But a copy has been produced, and another copy was pr
duced: And it appears to have been a precedent for draughts of th
nature, with change of names.

Whether it will be more for the demandant or againſt him,
ſhall not now remark: But though it may go farther than form
caſes, yet, upon the circumſtances, I think it *ought to be admitt*
on the foot of *preſumptive* evidence.

It appeared in evidence, that *two year's rent* had been paid
Oſbaldiſton for the premiſſes, after the death of *Catharine*, widow
J. Flanders.

But it was farther obſerved from the bench, that ſhe makes O
baldiſton executor of her *real and perſonal* eſtate. (Of *both*.)

Witneſs called to prove an obliteration of an indorſement on o
of the two papers given as evidence of a leaſe. The indorſeme
was, "Another draught made;" and the witneſs acknowledg
ſtriking out theſe words. Obſervation, that, from the appearanc
theſe words were firſt eraſed, and then ſtruck through with the in

Court—This ſhould have been mentioned before: For it mig
have prevented it's being admitted in evidence. For a draught *m*
nufactured, though the eraſure afterwards explained, might ha
been refuſed.

The witneſs examined.

Did you conſider yourſelf as attorney againſt *Clarke*?

Yes.

At the time when you did this you was concerned for Mr. *Tyſſen*, gainſt Mr. *Clarke*?

I ſuppoſe I was.

Had you not for ſeveral months before been concerned?

I believe I was.

April 1770. Was it not?

I do not know.

Is that your hand-writing?

It is my clerk's, and I ſigned it.

This was a letter in *May*, threatening an ejectment: In *July* the lteration was made; and Mr. *Tyſſen* never employed him afterwards.

Was it on account of this?

Anſwer—I gave the papers, and ſaid I would appear whenever it came before the court.

Obſervations to the recognitors of the grand aſſize, on the part of the tenant.

Evidence on the part of the tenant of a purchaſe in fee, for a valuable conſideration, 1000 *l.* lent upon mortgage of the premiſſes, ix years before. That they had endeavoured to ſuggeſt fraud, becauſe *Clarke*, at thirty-eight years diſtance from the mortgage, could ot prove payment.

The term they would ſpeak of expired in 1747, commencing in 1706, and continuing, they ſay, forty-one years. The demandant, Mr. *Tyſſen*, was then thirty years old. This leaſe is not ſaid to have been *cancelled*: It was a ſtanding *precedent*, they ſay. Mr. *Tyſſen* then *knew* the term was *expired*. Why, then, not call for a ſurrender, and make a new leaſe? For the eſtate was improved very much by the erection of houſes upon it; an improvement natural to be made by a tenant in fee, but not very uſual, or eaſily accountable, in a tenant for years. If this had been a term eſtate the lord might have demanded, and was highly intereſted in demanding, a ſurrender, when the term expired. He *might* have done it then; and *would* have done it certainly: But he has not. What is the

con-

conſequence? That there never was a leaſe granted—That ſome propoſals there might be.

Laying down this *poſtulatum*, that poſſeſſion is the beſt guarante perhaps, of half the inheritances of this country, and *ought* to be and eſtates ſo held ought not to be ſhaken but for ſtrong cauſe, th application ſtrikes of itſelf, irreſiſtibly.

But, independent of poſſeſſion, what evidence is there here, no only of what the poſſeſſion has been, and is, but that it ought be as it is and has been?

The *præcipe* directing a view to enquire and return whether ſuc a piece parcel of the waſte, and admitted to be the premiſſes i queſtion, may be encloſed by *J. Flanders*, to be holden and enjoyed by *T. Flanders*, his *heirs* and aſſigns.

Anſwer—That it may; and *T. Flanders*, his heirs and aſſigns, ſha not do ſo and ſo.

Both *præcipe*, therefore, and return go to a *fee ſimple*. If ther be other precepts and returns, of like kind with this, and yet fo years, I grant it a full anſwer.

But they ſay there is another inſtance, where the *præcipe* an return ſpeaks the ſame language with this; whether ſuch a piec may be encloſed, to be held by the lord and his heirs, and they anſwer yes. Certainly; it was his *fee ſimple*. What they conſent h ſhould incloſe was his *fee ſimple* before.

This is 21 *April* 1704. There are two more ſuch, 1707 an 1711, both to the lord.

1758. To know how much a cottager may encloſe without prejudice; not a word *to his heirs and aſſigns*.

1761. To enquire what part *Flanders* may encloſe for his own uſe; they anſwer he might ſo much for his own uſe. Leaſe fifty-one years granted, third of *April*, 1741, how much Mr. *Clark* may incloſe; but no mention of *heirs* and *aſſigns*.

What does this prove? That the word *heirs* and *aſſigns* has neve been made uſe of but when it ſhould.

The reaſon of relying on ſixty years poſſeſſion is, that it wa *thought* neceſſary ſixty years poſſeſſion ſhould be proved. They were reſolved to try a method of precluding us; when, in all common inſtances, *twenty* years poſſeſſion is ſufficient: And I believe *no body* in court remembers an action of this nature. However, if ſixty years poſſeſſion be not proved, which would abſolutely bar an action, yet, if a poſſeſſion of about fifty years be proved, a *continued, ndiſturbed* poſſeſſion, ſuch as it is highly improbable could have ariſen but under an eſtate in *fee* in the *tenant*, and thoſe under whom he claims; if this poſſeſſion ſtood many years after the preſent *demandant* came of age, unſhaken, unmoleſted, *unqueſtioned*; if it be imprudent, in the higheſt degree unnatural to ſuppoſe, and even incredible, unleſs upon demonſtration, that Mr. *Tyſſen* ſhould ſuffer a poſſeſſion ſo long, *deceitfully* to others, and injuriouſly to himſelf; if the precept by the ſteward of the lord himſelf, and ſuch a ſteward, of ſuch learning and accuracy, Sir *Edward Northey*, whom you will not *preſume* to have erred, only becauſe it is neceſſary to my friend to deſire you to preſume it, and becauſe he ſays it's *poſſible*, a *præcipe* iſſued, to enquire of the premiſſes how much *J. Flanders*, under whom the tenant claims, might incloſe to his *heirs* and aſſigns—If they return that he may incloſe the *very* premiſſes in queſtion to his own uſe, to hold and enjoy to himſelf, his heirs and aſſigns: If it is uſed as real eſtate; paſſed as real eſtate, by ſeveral deeds, by fine, by will—There is full authority, and the higheſt reaſon, to *preſume* that it did (as theſe circumſtances, precedent and ſubſequent, this evidence of record, evidence of poſſeſſion, evidence of the lord himſelf concur in proving) actually paſs in *fee*; and was meant and underſtood ſo to paſs.

As to no inſtances of eſtates in *fee* paſſing in the waſte of the manor, there are no inſtances of ſuch words uſed, except in the caſe of the lord himſelf, where it could paſs no otherwiſe, and here.

But this eſtate, ſay they, went in the courſe of perſonalty. *Oſbaldiſton* took by two titles, as perſonal repreſentative and reſiduary legatee, under the will of *Catharine Flanders*. You will judge whether ſhe meant to give it to him as perſonalty, when the words of the will contradiſtinguiſh it clearly from the *perſonal* eſtate.

But the receivers have charged themſelves with the receipt of the ents. The queſtion is, whether quit-rents or conventionary rents. They take no notice which of theſe it is.

That they are not accurate is plain; for they take notice of three years received of *Catherine Flanders*, at a time when ſhe was dead. (It was objected, that the receivers had diſtinguiſhed this from quit-ent.) What does it import, whether the receivers thought it quit-ent, or annual rent? And what mattered it to them which it was?

Let me cloſe all with the objection with which I began: You ave before you a perſon claiming under a fair purchaſor, for good nd valuable conſideration, who paid as for the full value of a *fee*;

never queſtioned for about fifty years, and never diſputed in the li
of *Oſbaldiſton*, and his aſſigns, on whom they might have come fo
value. I ſubmit, from the hazard of eſtates in general, and th
inequality of the riſque in this particular caſe, you would not hav
been inclined, even if the evidence had been nearly equal, to decid
againſt a poſſeſſion ſo dearly purchaſed, enjoyed with ſuch expenc
and carrying with it ſuch tokens and evidences of right. Very pr
carious, indeed, will be the condition of almoſt every man's eſtat
if the evidence by which it is to fall needs be no ſtronger than th
offered by the demandant; and if evidence ſo various, ſo clear,
unexceptionable as that on the part of the tenant, ſhall be inſuff
cient to ſupport it. Thus much to the general juſtice and ſafet
As to the particular juſtice of the caſe; if Mr. *Tyſſen* loſes any thin
he loſes what he and his anceſtor have overlooked at leaſt, and treate
as not their own for a long courſe of years; and what he no
claims not very favourably at leaſt. If Mr. *Clarke* loſes any thin
it will be that which came to him from his father, as by legal d
ſcent from a fair honeſt purchaſer; what at leaſt appears to ha
been intended for him in the manner in which he claims it by t
father of Mr. *Tyſſen*, the now demandant, what he, and thoſe u
der whom he claims, have enjoyed openly, peaceably, continuall
without diſpute or doubt of their title, for ſuch a number of yea
as has been already ſtated: What has been brought to it's preſe
ſtate of value at great coſts and trouble on the part of thoſe fro
whom it is now attempted to be taken by your verdict; what tho
who claim cannot ſhew any title to have; and what has been enjoye
hitherto without any evidence of any other title of enjoyment, ex
cept in the manner and in the extent in which they ſtill hope t
juſtice of your deciſion will enable them to retain it, if intent
parties, poſſeſſion, and the ſtrongeſt preſumption of law and reaſo
are ſufficient to entitle them.

Lord Chief Juſtice *De Grey*—

Gentlemen, You are the *recognitors* of the *grand aſſize*, on a *wr*
of right, to try the *right* to a piece of ground, now become val
able by houſes built upon it: And you are to decide upon the *me*
right, without regard to the poſſeſſion.

I think you will better underſtand the evidence if I bring hiſto
cally the facts before you.

Mr. *Tyſſen* was lord of the manor of *Hackney*, where, I ſuppo
there was more waſte formerly than now.

By the common law, a lord of the manor may encloſe, leavi
ſufficient to the tenants; and this is called approvement: But
muſt ſhew he does leave ſufficient. A *grantee* cannot do the ſam
Th

This, probably, introduced the mode of providing him before-hand with the acknowledgment of the tenants.

This cuſtom has been prevalent in the manor about a century, and, with a few ſcattered inſtances, in the former century.

Here is a precept, iſſued by the ſteward, to enquire how much *J. Flanders* may encloſe of the waſte in ſuch a place, being the premiſſes in queſtion, to the uſe of himſelf, his *heirs* and aſſigns; and the return is, "That he may encloſe the premiſſes in queſtion, to "hold and enjoy to himſelf, his *heirs* and aſſigns *for ever*: But *pro*"*vided*, that neither his *heirs* nor aſſigns ſhall build any thing againſt "a certain houſe."

It appears *Flanders* was in poſſeſſion of the premiſſes after this return: No *grant* appears, nor leaſe.

He died about 1720, his wife took out *adminiſtration*; and, as adminiſtratrix, ſhe enjoyed the premiſſes. There was an houſe at that time.

She gives by her will her houſe, and by the latter part all her *real* and *perſonal* eſtate, to *Oſbaldiſton*; whom ſhe appoints her executor and *reſiduary* legatee. Whether, therefore, for *years* or in *fee*, it would paſs. She paid rent, and *Oſbaldiſton* pays rent for two years afterwards.

Two years before Mr. *Tyſſen*, the now *demandant*, came of age, Mr. *Oſbaldiſton*, with no title but under the will, as far as appears, mortgages in *fee*. The mortgagee does not appear to have enquired into the title, and pays 1000 *l.* upon it. In 1742 he pays 500 *l.* more, and purchaſes the equity of redemption; and a fine is to be levied for further aſſurance. A fine is accordingly levied, and it goes upon the poſſeſſion, and what effect he might ſuppoſe the fine had.

It is obſervable, that in this conveyance no notice is taken of *Oſbaldiſton*'s title; and he ſets forth the houſe as partly built by himſelf and part *before*, without ſaying by *whom*. You will judge how far this ſeems to affect the fairneſs of the title.

You will conſider farther, whether in 1706 there was a leaſe for *years*, or a grant in *fee*: One or other you are to *preſume*.

It is obſerved on the *præcipe* and return, that not only *Flanders* perſonally, but his *heirs* are intereſted; and his *heirs* are to comply with the condition expreſſed in the return.

As to the *rent* made payable, it is *ambiguous:* In point of quan tity, it is what we ſee reſerved on the building leaſes; but it migh be reſerved upon a grant in *fee*.

Another objection, if it had been a grant for forty-one years, i the year 1747 Mr. *Tyſſen* was much above a minor, and ſuffers po ſeſſion till 1773 This is not a *bar*, nor uſed as ſuch; but only a evidence, upon the tacit acknowledgment for twenty-five years, an to ſhew that it was not a term of forty-one years; and no middl caſe is ſtated: If it was not a term it was a fee.

The fine is no farther than as proof that *Oſbaldiſton* meant to con vey a fee; for it is no *bar* when tenant for years levies a *fine*.

Mr. *Tyſſen* deſires you will obſerve how far this ſuppoſition of conveyance in fee agrees with the *general uſage, before, at* the tim and *after*. This is only a circumſtance againſt their circumſtanc of *preſumption*.

They deſire you would conſider that *poſſeſſion* has gone *accordingl* as of fee. But to this *contrary* preſumption is ſet up, that it do not appear how the wife took it; ſhe might take it as perſonalty That *Oſbaldiſton*, who took from her, might take a perſonal r preſentative. And as to the words of the will, perhaps muc ſtreſs is not to be laid on them, as it is certainly very inaccurate worded.

Another thing, they rely, that if *Clarke* ſuffers, he ſuffers by h own fault; for he relied on the poſſeſſion, and had *no* title deed And he waited till 1742 before he relied on the fine, which cou not be good if it had been from one ſeiſed of the freehold, right o wrong, before 1747: And if by one, as they ſay, poſſeſſed of term only, it was *void* from the beginning, and non-claim could n make it good.

The receiver's account is only made up for Mr. *Tyſſen* by h agents, and *bars no one elſe*.

I will *now* ſtate the evidence. Conveyance by leaſe and relea from *Oſbaldiſton* and wife, to *G. Clarke*. This is a mortgage in fe and recites that he has a good, abſolute, and indefeaſible eſtate of f ſimple in the premiſſes, and has good and lawful power, right an title, to convey the ſame in fee, except only a quit-rent of ten ſhi lings, due to the lord of the manor, and he covenants to convey ac cordingly.

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*His Lordſhip proceeded with the reſt of the evidence: That in 1742 *Oſbaldiſton* releaſed the equity of redemption in *fee* to *George Clarke*, no evidence of fraud. Covenant that eſtate is free from incumbrances; and to levy a fine. In 1742 a fine levied by *Oſbaldiſton* and his wife, to the uſe of *George Clarke*, (the father of the tenant) in *fee*: The *tenant* is admitted to be his *heir*. Poſſeſſion proved in the father and ſon from that time to *this*; a deed poll of attornment of *Oſbaldiſton* and the tenants, to *George Clarke*: This, as is preſumed, might be a *fee*.

Evidence on the part of the demandant—That his anceſtors have been in poſſeſſion, and lords of the manor of *Hackney* before 1706. Uſage to iſſue precepts, and make returns, in the nature of writs of *ad quod damnum*. And if return that it would not be *prejudicial* for lord to encloſe, he uſed to encloſe ſo much as was ſet out in ſuch returns, and make *leaſes* for years; and to be ſure he might grant in fee if he pleaſed; but by the uſage it appears they were all *leaſes*, and no inſtance of a grant in *fee*.

As to the draught which came out of *Oſbaldiſton*'s hand, that if one were to conjecture, one might, that Mr. *Tyſſen*'s attorney at *that* time made the draught. A draught the *leaſt* kind of evidence—leſſee might refuſe becauſe he wanted a *fee*, or did not like the covenants and conditions. Nothing appears to have been done in conſequence, and doubtful whether ever *any* leaſe.

Strange how *both* parts of a leaſe (if ever there was one) could be loſt or deſtroyed; if *Oſbaldiſton* had deſtroyed the original, one would think he would alſo have deſtroyed the draught; but no evidence of deſtruction, becauſe no poſitive evidence of a leaſe; nothing but circumſtances. That the counterpart, ſuppoſed to be in the hands of the lord of the manor, is alſo loſt. (If there ever was one.) That if there was a leaſe, it might be for ninety-nine years, for any thing that appeared, and ſo, that way, the right would be ſtill in *Clarke*, the *tenant* to the writ.

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* The trial laſted, I believe, about eleven hours. Vide this caſe and the form of proceedings in the third volume of Serjeant *Wilſon*, from whoſe learned Report I have taken the liberty to borrow the ſubſtance of the ſumming up, from this mark.* I was preſent at the whole of the trial, but my paper failed me, and I did not take notes (or at leaſt not that I can make out) at the latter end, ſo far as from the above mark.

Vide alſo Sir *William Blackſtone* on the writ of right, and it's incident trial by *Battel*, vol. 3. c. 10. Ch. 22. ſ. 5. Vol. 4. c. 27. ſ. 3. Ch. 33. ſ. 2. tit. 4 & 5.

That theſe draughts appeared to be the weakeſt poſſible evidenc to prove that a leaſe exiſted. If they *preſumed* a leaſe, upon the ſlender evidence of theſe draughts, they muſt preſume it to have bee according to the draughts; that is, for forty-one years.

This is the ſubſtance of the evidence on *both* ſides; on which yo are to determine whether the tenant has a greater right to hold th tenements in queſtion to him and his *heirs*, or the *demandant* to hol the ſame to him and his *heirs*, as he has demanded them.

The *recognitors* of the *grand aſſize* withdrew for about the ſpac of half an hour, and then brought in

VERDICT for the DEMANDANT.

B. R.

Caſe of Sir John Carter.

ON a motion for an information, in the nature of a *quo warranto*, againſt Sir *John Carter*, to ſhew cauſe why he exerciſes the office of burgeſs in the borough of *Portſmouth*.

The charter gives power to the majority of the mayor and aldermen to elect *ſuch and ſuch like* as they ſhall chooſe, to be burgeſſe of the corporation.

One of the objections was, that at the time of his being *choſe* Sir *John Carter* was an infant, under the age of diſcretion, and tha he was then *admitted* a burgeſs; which *election* and *admiſſion* was *illegal* and *void*.

And it was contended, that all the elections of mayors and recorders ſince this election of Sir *John Carter* were illegal and void in conſequence, ſuppoſing he was illegally choſen burgeſs of the corporation.

With reſpect to the firſt objection, it was ſaid that in two caſe which had been cited on the other ſide, (one from *Barnardiſton* in both Lord *Hardwicke* is ſaid to have declared, that he did no know it had ever been determined: And that it does not appear tha either of thoſe caſes have been determined to this hour.

That, on the other ſide, to repel this objection, it did not ſeem neceſſary to cite many caſes, and that there ſeemed no reaſon againſ th the infant's being elected into ſuch an office; for that the right was derivable upon him then from thoſe who had the power to confer this privilege, and might be exerciſed afterwards.

That this was a miniſterial office; and *miniſterial* offices may be executed by an infant; and that by deputy an infant may execute even a *judicial* office in moſt caſes.

Caſe of the Duke of *Bedford*, on an information to ſhew cauſe why he exerciſed the office of the *Bedford* company.

Firſt objection, that he was not ſworn before the proper officers, nor in the proper place. On this the rule was made abſolute.

Second, that he was a minor; and upon this latter the court did not determine, but conſidered the objection in a manner that infers, if it had been neceſſary to have determined, it would not have prevailed.

Beſides this caſe, (which at leaſt ſhews the objection was far from thought concluſive, or very ſtrongly founded) on the conſideration that the practice in a vaſt variety of boroughs, and even in this, has gone in ſupport of this kind of elections, it is to be preſumed the objection will not now meet with any great degree of favour.

As to the ſecond objection, that this election muſt neceſſarily be preceded by ſummons, and that there was no good mayor to make a ſummons, and therefore no good election. The anſwer, that all who could have been within the reach of the ſummons came, and but one of the body was abſent, who was out of the reach of the ſummons, and came not, by reaſon of particular buſineſs.

That here was not a caſe of filling up theſe elections with infants, to the prejudice of others, who might otherwiſe have been choſen, the number being indefinite.

As to the majority of the mayor and aldermen, that this was ſufficiently anſwered, if when ſix aldermen, and the mayor being preſent, the aldermen voted; nay, even if the mayor had been abſent.

It is certain as to the former objection, of age, that the king can confer a *peerage* on a perſon under age; and a *peerage* certainly infers a *judicial truſt*.

Lord *Mansfield*—How is it when they are entitled by ſervitude? Are they ever admitted before of age?

[*Note*, It ſeemed that in ſome caſes the ſons of freemen were free
men by deſcent, even before the admiſſion of their parents.]

Cro. Car. 576.

Infants are capable of taking for their own private benefit an
thing that is not prejudicial to the public. This is a *mere perſon*
franchiſe, with *no* adminiſtration of the court buſineſs; nor has h
any thing upon the choice of a mayor.

If they ſay an infant cannot be *elected* burgeſs, they muſt ſay th
king cannot appoint an infant burgeſs; nor could he have done
upon the *original* conſtitution. If the king could, he has given the
full power; for he has given them power to elect *ſo many* and *ſuc*
as they ſhall chooſe.

That acquieſcence for many years, even down from 1751, whe
Sir *Thomas Gibbons* was elected a burgeſs, and *many others* ſinc
ought to be grounds to avoid diſturbing the matter farther.

Statute *W.* 3. That no perſon under the age of twenty-one ſha
be *elected* to ſerve in parliament, and that if any be, ſuch electio
ſhall be null and void; and a penalty if any under age preſume
ſit. This ſhews that *before* the act it was not thought or underſtoo
by the legiſlature, that ſuch election was void; but that a *ſpeci*
proviſion was thought neceſſary, to make void for the future, as
that particular caſe of elections to ſerve in parliament; which woul
not have been if it was void *generally* before.

Burgeſs not within the teſt-act, *Fitz-Gibbons*, 193. And th
reaſon aſſigned is, becauſe he does not exerciſe a *magiſterial* office
the corporation.

There were *ſix* counſel ſpoke againſt the rule, and *ſix* were goin
to ſpeak on the other ſide.

Lord *Mansfield*—The only thing we are now conſidering is, whe
ther the rule ſhall be made abſolute; that is, whether it ſhall go
trial.

The only thing which ſtruck me is what occurred in the latt
part of the argument. It was ſaid, upon circumſtances, that th
court would not interpoſe, to *diſturb* the *peace* of the corporatio
And if there had been a *great* courſe of years, and it had bee
likely to go to the *extinction* of the corporation, it might have bee
ſo.

Th

This being on a point of *doubtful law*, the argument from lapſe of years (there not being any danger of extinction of the corporation, and the party complaining not being a member) does not apply, as beyond bare matter of fact.

Indeed in a caſe of a dubious fact, whether reſidence or not reſidence, they were not permitted to proceed, having ſtaid an *unreaſonable* time, till the proofs of reſidence might reaſonably be preſumed to be extinct.

As to the queſtion in *law*, whether an infant is capable of being *choſen* a burgeſs, it may be a *very conſiderable* queſtion. To be ſure, an infant is *capable* of all grants of *intereſt* and *property*.

Suppoſe the crown had appointed an *infant* on the *firſt* inſtitution, admiſſion would not have been neceſſary.

The nature of the privileges of burgeſſes may make a *great* difference.

But it goes *concluſively* to grant the rule abſolute: It is ſaid, don't grant the rule abſolute, becauſe it has never been decided; becauſe it is a point of very great conſequence, and may diſturb the corporation. But it is therefore that the court *will* grant the rule abſolute; *becauſe* it *is* of great conſequence; *becauſe* it has *never* been decided; *becauſe* almoſt all the corporations in the kingdom are intereſted.

It is ſaid the caſe before Lord *Hardwicke* ſtands upon a demurrer. Is not this a reaſon why it ſhould go to trial, and not be decided in a ſummary manner, where there can be no error againſt our judgment?

But it ſeems (it is ſaid) it's *determined* in this court; there is a *ſolemn judgment:* And *Barnardiſton* is cited. The ground of the determination and the nature of the burgeſs's office there is not ſtated: And I believe that it was a matter of *property* and intereſt rather than of *truſt*.

The court was *clear*, as to the firſt objection: Then, ſays the Serjeant, the court declared the other objection was not *material*; that is, I ſuppoſe, becauſe the rule went abſolute on the firſt objection; and therefore not material to conſider the other.

No meeting of the aldermen *without* a mayor *could be good*.

And he muſt act, *eo nomine*, as mayor.

It is a *clear* caſe to make the rule abſolute, indeed as of *courſe.*

Rule absolute accordingly.

Recordari facias loquelam.

THE writs of *recordari facias loquelam* are *conditional.*—If th cauſe be *true*, then he is to return the writ.

Plaint.

DEFENDANT cannot legally remove plaint *without cauſe* plaintiff *may.*

Coſts on the Statute.

WHERE an indictment is removed by *certiorari* from th quarter-ſeſſions, the maſter ſhall tax the proſecutor his coſt and if not paid within ten days an attachment ſhall iſſue: And al the recognizance ſhall ſtand as a ſecurity.

Error.

IT ſeems bail are not anſwerable for coſts in error.

Outlawry.

IT being on a felony, the defendant was brought to aſſign error i perſon.

And he aſſigned for error ſeveral cauſes.

1. That no public proclamation is mentioned to have been mad

2. That it is not mentioned he dwelt out of the pariſh, and therefore proclamation was made in the next adjoining pariſh.

3. Nor that it was made immediately after the ſermon.

4. Nor forthwith after the ſervice, as directed, if no ſermon.

Tha

That there was a miſnomer of the coroner.

That he is ſtated to be within the kingdom; whereas, in truth and in fact, he was abroad the whole time.

Lord *Manſfield*—This laſt of the objections is an error in *fact*, which the attorney-general will agree to confeſs. As to errors in point of law, it may be material to conſider them.

The next day Mr. Attorney-general prayeth aſſignment of the error in fact might be read, and it is read accordingly.

JUDGMENT, that the OUTLAWRY be REVERSED, and DEFENDANT RESTORED to all that he demands.

New Trial.

IN a caſe where a verdict had been found againſt evidence, but according to the merits. The court will not grant a new trial where the jury have found according to the juſtice of the caſe, tho' they may have found *againſt* the *form*, and may have been *wrong* in ſo doing: For when the *ſubſtantial juſtice* appears to have been anſwered, the court will not ſuffer the chance of it's being defeated; nor the parties to be turned round to a ſecond trial, when the merits have been decided.

Lord Archer *againſt* Whitehouſe.

TRESPASS for digging the ſoil of the plaintiff's heath.

Defendant juſtifies, under a conveyance from *Sherlock*, late Lord Biſhop of *London*, who demiſed the ſoil in queſtion, as of his own purchaſe, to Sir *Thomas Gooch*, under whom the defendant juſtifies.

The jury found for the plaintiff.

This was on a motion for a new trial.

Evidence from the report, that the plaintiff had brought action for damages done by cattle on the warren, which was the place in queſtion.

That there had never been any rent paid to the biſhop.

That the lands had been always held, and *reputed* to belong the lord of the manor.

That rents were regularly paid to Lord *Archer*'s father.

That ejectment was brought againſt one of the tenants, who r fuſed to pay rent, and his lordſhip turned him out of the manor.

That he never heard of any rents paid to the biſhop; but abo fifty years ago rent had been demanded by the ſteward of Sir *Th* *mas Gooch*, who claimed in the biſhop's right.

Another witneſs, as to the reputation of the ownerſhip of the ſo and the ejectment againſt the tenant refuſing to pay rent as above

They ſet forth a leaſe of *H.* 8. and a grant of *Philip* and *Mar* which recites the leaſe, and grants *totam warrenam cuniculorum* *unum* tenementum *noſtrum* ſuper *eandem* warrenam *ac univerſum ſta* *num noſtrum ſuper eandem warrenam continens per æſtimationem*, &

Evidence for the defendant, that the ſoil of the heath had alwa been reputed to belong to the biſhop: That only the biſhop's t nants had a right to fiſh in *ſtagno prædicto*.

That rent had been paid to the biſhop.

That about fourteen years ago an acknowledgment had been take of encroachment upon the heath.

At the trial Serjeant *Sayer*, who then ſat in the commiſſion aſſize, obſerved the preſumption was in favour of the owner of t ſoil; and that an ejectment was a ſtrong aſſertion of ownerſhi That the fiſhing might well agree with the ſoil, being in another but not ſo well the cutting of turf, whereby the feed of the rabbe was diminiſhed.

In point of law it was contended by Serjeant *Davy*, at the aſſize that by grant of the term the ſoil was ſevered from the manor.

Serjeant *Hill*—That *warrena cuniculorum* was different from *war* *rena* ſimply, and that after the term the *ſoil* would *reunite* to t manor, and accordingly well paſſed under the grant of the reverſio by *Philip* and *Mary*.

The new trial was moved upon *two* grounds.

1ſt, The one as for a ſuppoſed *miſdirection* of the jury.

2dly, The other as for a verdict againſt evidence.

The warren was in another perſon at the time the manor paſſed, ut the grant of the reverſion of the warren was under the *ſame* inrument by which the manor paſſed.

On the other hand it was relied on, that nothing leſs than the *ſoil* aſſed with the franchiſe, *unum tenementum ſuper eandem warrenam.* Now this tenement could be *only* upon the *ſoil*, and *not* upon the *inrporeal* franchiſe, and metaphyſical ſubſtance of the warren.

Lord *Mansfield*—What title do you ſet up? It certainly comes to he manor by the leaſe from *H.* 8. it could not come to your hands ut by a leaſe from the lord of the manor: I ſhould like to ſee ſome uch leaſe. You have no ground. It is the cleareſt caſe in the world. *H.* 8. granted a term; *Philip* and *Mary* grant the reverſion f the warren, *together* with the manor: They *clearly* paſſed *jointly*.

You have the enjoyment of the warren; you muſt have it by ome *written* title; you have *not ſhewn* it: We ſhall *preſume* it was ecauſe either the words were *not* ſuch as would paſs the *ſoil*, or *exreſsly nothing but the* franchiſe.

Here you have ſhewn *no* title—the verdict will be *no* bar whenever you can ſhew one.

Replevin.

HERIOT. Cuſtom ſet forth; namely, that the lord is entitled to the ſecond-beſt beaſt at every death or alienation of tenant.

And farther, that if the tenant has but *one* beaſt, then he is to ay the beaſt; and if he has no beaſt, then proviſion for a certain ompenſation in lieu of it.

In the evidence of the cuſtom it appeared there was an exception f *meſne ſigniories* and manors, lands holden in ancient burgage; nd alſo of *alienation* to the *uſe* of *alienor* and his heirs, or to the ſe of the *laſt will* and *teſtament*, or as *jointure* to his *wife*.

Mr. *Bearcroft*—The queſtion ſubmitted to the court is, whether he *cuſtom* ſet forth on the cognizance is agreeable to *evidence*. The uſtom is ſet forth as a *general cuſtom* in the manor, that the lord is entitled to take after the death of *every* tenant who died ſeiſed. (ſ as above) He called many witneſſes to prove the cuſtom *exactly* *it was laid*. The *parol* evidence not being full, the decree in court of the duchy of *Lancaſter* was produced in evidence. A taking the cuſtom as it appears on the face of the decree, it will pear *firſt* to your Lordſhip, that the exception only extends to laſt inſtances, reſpecting *alienation*.

The firſt words are as *general* as can be. "Upon all and ev "alienation of all and every piece or parcel of land, freehold "cuſtomary." And I apprehend the exception only extends to laſt inſtances, which do not affect our caſe. As to the excepti where there is no beaſt, it is very reaſonable; but it makes no p of our caſe.

Mr. Juſtice *Aſton*—How do you confine the exception to the l particular?

Anſwer—The decree goes on ſeveral caſes; firſt, where there *two* beaſts; ſecond, where but *one*; *laſt*, where *none*. And the takes up a new branch, and ſeparates the caſe of death, or alie tion, and of this it makes a diſtinct ſentence, and goes upon poi to which this caſe of ours does *not extend*—Alienation to uſe alienor and his heirs, laſt will and teſtament, and ſettlement for wife.

As to lands, they except only *meſne* ſigniories, lands holden *knights ſervice*, and ancient burgage.

Lord *Mansfield*—I am ſenſible in point of *form* the exception *good*, though there is *nothing* upon the *merits*.

There is an exception of lands in *ancient burgage*, or *meſne* ſig ories. As to *knights ſervice*, it is at an end.

Leave to have a *new trial*, on *payment* of *coſts*, and that the *fendant* be at *liberty* to *amend*.

Fenton's Caſe.

Eſcape.

DECLARATION ſtates a debt, arreſt, and ſubſequ eſcape.

It was objected, that there was no proof of the *capias ad ſatisfaci* *dum* delivered. But the *non eſt inventus* returned by the ſheriff h held by Mr. Juſtice *Willes*, the judge who tried, ſufficient evidence againſt the ſheriff to conclude him.

It was farther inſiſted, that here was *no* arreſt; for that *no warrant* was ſhewn; and that the perſon who actually made the arreſt was ſon to the bailiff; and that the bailiff was within about thirty yards, but *not in ſight*.

Under the directions of the court, it was left to the jury, who conſidered the ſon as aiding and aſſiſting his father.

6 *Mod.* 211. No determination; it was where the bailiff's aſſiſtant went up ſtairs. The bailiff did not go up ſtairs, but ſtaid at the bottom.

It was ſaid, that the diſtinction of law ſeemed to be, that the bailiff muſt be *quodam-modo* preſent.

On the objection taken that *no warrant* was ſhewn, and that the arreſt not made by any ſheriff's officer.

This it was intimated had not been ſpoken to at the trial.

As to the bailiffs not being preſent, that there was evidence ſufficient before the jury for them to find him *preſent*, at leaſt ſo far as was *legally* neceſſary. And that the taking need not be *expreſſly* and *manually* by the bailiff; but the act of the ſon or ſervant is the act of the bailiff, within the ſtatute.

It was argued *ab inconvenienti* if the doctrine ſhould be held otherwiſe.

That there was a caſe in *Salkeld*, and in 3 *Modern*, upon this ſubject, with this difference only in *Salkeld*, that he ſays the bailiff was *no way* preſent.

As to non-appearance of the warrant, if this had been an action of *falſe impriſonment* every thing muſt have been *ſtrictly* purſued, and the authority clearly ſhewn; but otherwiſe here, where the ſheriff is charged civilly.

Lord *Mansfield*—Was this objection mentioned on the trial?

Mr. Juſtice *Willes* ſaid he had taken no *note* of it.

It ſeemed to be agreed at laſt, that it was curſorily mentioned at the trial, but not much relied upon.

It

It was ſaid, that it appeared in evidence that upon the inſtant eſcape, *Fenton*, the bailiff, ſaid, “ Then I myſelf muſt pay the “ debt.”

That as to the father's not being preſent, all evidence is to be conſidered according to the perſons to whom it applies, and the manner in which it is anſwered. If the father was not by, why did they not call the ſon, and prove he was not? If they denied the warrant, why not diſprove it by the officer? They having done nothing to *negative* the evidence, it ſtands in it's *full* force.

Another counſel ſaid, that it appeared, as to the caſe in 3d *Mod.* that a verdict was given for the plaintiff; and that it did *not* appear that verdict had been complained of.

The ſheriff has no right to ſay to the plaintiff in this action, “ I “ did not give a warrant in writing, becauſe, as between me and my “ officer, I proceeded as upon his diſcretion.”

If he cannot ſay it, there is no evidence either way; ſo that the court cannot ſay there was a warrant. A writ delivered to the ſheriff, and endorſed by the officer to whom he gives it, to execute that proceſs.

Mr. *Wallace*—That it was very true, the plaintiffs alledged in their declaration, and were very ſtudious to prove an arreſt; and with reaſon; for if *no legal* arreſt no *eſcape*.*

Now to prove the arreſt, it muſt be proved either that he arreſted *perſonally*;

Or ſome body in his *preſence*, or by his *command*, or delegated authority.

Now as to the ſecond, *no leſs* authority than under *hand* and *ſea* will be good, nor can any man be juſtified for making *ſuch* arreſt.

Your Lordſhip on ſuch a caſe, properly before you, would have *diſcharged* the *priſoner*; and it is *ſtrange* if the ſheriff ſhould abide the conſequences of the arreſt as legal, where, for want of legality, the priſoner muſt have been *diſcharged*.

They are obliged to prove *two* things; authority from the ſheriff to the bailiff, and an arreſt by the ſon, under that authority, and in *preſence* of the bailiff, or at leaſt by his *command*.

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* Sublatâ cauſâ tollitur effectus.

Could not they have called up the *ſheriff's officer*, to have *produced the warrant?* Then, upon a refuſal, they might have called in *parol evidence*, to prove ſuch a warrant had exiſted.

But farther, had they proved the warrant, I ſubmit, this is *no* arreſt to *charge* the *ſheriff*.

The ſheriff may authorize a bailiff to *arreſt*; the bailiff may act *ſolely*, or with *others*; but they muſt act *under his authority*, and, as I conceive, in *his preſence*.

The evidence is, that the old man was in the houſe, and *continued* there—And your Lordſhip will find rods inſtead of yards, which makes it about two hundred yards.

Mr. *Cox*—That it would be extremely hard and inconvenient if this were to bind the ſheriff: For that this man ſtaid in a different part of the town the bailiff, in whom the ſheriff placed his confidence; the ſon made the arreſt in his abſence, and in an *improper* place; and no attempt to ſhew *Fenton* heard of it till ſome time after.

Mr. *Morgan* objected, that the authority being demanded by defendant, and *none* ſhewn, therefore the arreſt bad.

6 *Rep.* 54. It was reſolved, that the ſheriff, or any other, by his authority, *ought* to ſhew at *whoſe ſuit*, for *what debt*, out of *what court*, and *when proceſs returnable*.

And ſo was Lord *Holt*'s opinion in the great caſe before him.

Lord *Mansfield*—It's a *very hard* action, and to be ſure, in an action attended with ſo much hardſhip, the jury has a leaning, as far as the *juſtice* of the caſe will permit.

One of the objections taken is, that the arreſt was not by the ſheriff's officer *himſelf*, the *father* being the officer, and the *ſon* the *hand arreſting*.

That the officer muſt be a party by *preſence*, giving *authority*, or *ſome way*, is *certain*. He *need not* be *actually* in *ſight*. The *exact diſtance* is not *neceſſary*; but he *muſt be* upon *that buſineſs* at *that time*.

A witneſs proved that he went out of the public houſe *on purpoſe* to arreſt him.

There is no certain ſpeaking of the diſtance at a particular tim
only when the witneſs ſaw him he was about that diſtance. *Now*
evidence is to be weighed according to the evidence produced on one ſ
with what might have been produced on the other. Now the ſon w
a very proper perſon to have been called by the plaintiff, to h
given evidence againſt his father; for, in fact, they have broug
this evidence againſt *Fenton*; for the bailiff always gives ſecurity.

It was very fairly left to the jury, who have found upon a c
not probable in it's circumſtances: And if we granted a new t
we ſhould ſay that, upon the weight of the evidence, they ought
have found for the defendant, which in *doubtful* circumſtances
will not do.

As to the other objection, I think the return to the writ is ſuf
cient evidence againſt the ſheriff; for he ſhews thereby the *cap*
ſatisfaciendum was delivered.

Mr. Juſtice *Aſton*—That there was great reaſon the bailiff ſho
be preſent, or ſo nigh as to be ſuppoſed in readineſs to act. Now
might have been out of the houſe; for they make the houſe th
hundred yards diſtant at leaſt, and he could not be more—taking
thirty or forty rods—than 150 or 200 yards. It is certain he m
not be in ſight, becauſe he may ſtand to watch.

Mr. Juſtice *Aſhhurſt*—That the arreſt was good, though not
the *hand* of the bailiff, he being near enough to act.

That the *ſlighteſt* evidence of the exiſtence of a warrant, wou
have been ſufficient. Now *Fenton*'s name appears indorſed on t
writ, which is ſtated to be the cuſtom of ſheriffs, with reſpect
the officer to whom they deliver the warrant.

RULE for granting a NEW TRIAL DISCHARGED.

New Trial.

Covenant.

ACTION for breach of covenant. Defendant replies *non f*
git conventionem. The queſtion turned upon repairs; and
appearing in evidence that there were thirty-eight years to run
the premiſſes, out of a term of forty, the jury thought the inju
was rather to the *poſſeſſion* than to the landlord. They found for t
defendant; whereupon the plaintiff moved for a *new trial*: And
the rule they contended, "That whereas the defendant *covenan*
"

“ to and with the plaintiff to keep the premiſſes, *from time to time*, “ in *good* and *ſufficient* repair.” Now if the landlord was to wait ill the end of the term, defendant might *aſſign*, and landlord be at a *loſs* for his *remedy*. That if *nominal* damages had been found, ſo as to oblige the tenant to repair, it would have been ſufficient.

Notice had been given to tenant to repair. The lead, it appeared, had been ſtolen off the houſe, and the tiles, to come at it. But the damage *had* been *repaired in a great meaſure*; and the jury ſaid they believed there was not above a *ſhilling* damages upon what was left *unrepaired*. Mr. Juſtice *Aſton* ſaid, upon *ſo ſmall* an occaſion, they *would not*: And the court never was *uſed* to grant a *new trial*.*

RULE DISCHARGED. Abſent Lord *Manſfield*.

Whitebread *againſt* Brookſbanks.

ACTION for money had and received, againſt an exciſe officer.

Queſtion, Whether the bounty to be allowed on exportation was to be determined by the average price, ſettled in the manner preſcribed by the ſtatute of his preſent majeſty, or the price at the exporting port.

Special verdict, that the plaintiff drew from malted corn 2600 barrels of beer, when barley was *under* the price of *twenty-four* ſhillings *per quarter*: That the beer paid all the duties; that plaintiff claimed to be allowed one ſhilling *per* barrel on exported beer when barley was at or under the price above-mentioned.

The *preamble* of the ſtatute recites,

“ Foraſmuch as it hath been found by experience that the exportation of corn and grain, when the price thereof is at a low “ rate in this kingdom, hath been a great advantage, not only to the “ owners of land, but to the trade of this kingdom in general:

“ Be it therefore enacted, *&c.*”

Then the act goes on to provide, that when malt or barley, *Wincheſter* meaſure, is or ſhall be *at four and twenty* ſhillings *per quarter, or under* (and ſo of rye and wheat, when at the prices in the act mentioned) *in any port* or *ports* of this kingdom, or of the do-

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* De minimis non curat lex.
Intereſt reipublicæ ut ſit finis litium.
Res judicata pro veritate accipitur.
Periculoſum eſt quod non bonorum virorum comprobatur exemplo.

minion of *Wales*, every merchant, or *other perſon*, who ſhall put o
ſhip-board in *Engliſh* ſhipping, the maſter and two-thirds of th
mariners at leaſt being the king's ſubjects, any ſorts of the cor
aforeſaid, with intent to *export* the ſaid corn, every ſuch merchan
or other perſon, ſhall bring a certificate in writing (in the manne
the act directs) upon bond given of *two hundred pounds at leaſt*, f
every *two hundred tons* of corn ſo ſhipped, and ſo *proportionably*, th
the ſame ſhall be exported to parts beyond the ſeas, and not agai
landed in *Ireland*, *Wales*, *Guernſey*, *Jerſey*, or *Berwick upon Twee*
ſhall be allowed by the farmers, commiſſioners, &c. in any po
where the corn ſhall be ſhipped, for every quarter of *barley* or *mal*
ground or unground, *two ſhillings* and ſix pence.

The act whereon the defendant reſts his caſe is the *tenth* of hi
preſent majeſty, *c.* 39. intitled an act for regiſtering the prices
which corn is ſold in the ſeveral counties of *Great Britain*, and th
quantity exported and imported.

And it recites, that " whereas a regiſter of the prices at whic
" corn is ſold in the ſeveral counties will be of public and gener
" advantage, be it enacted, &c." And it empowers the juſtices
at their general or quarter ſeſſions, after the 29th of *September*
yearly, to order and direct weekly returns of the prices of whea
rye, *barley*, oats, and beans, from not leſs than two or more tha
ſix markets, and appoint a proper perſon, inhabitant of ſuch mar
ket-town, to make ſuch returns. And the lord high treaſurer is t
appoint a proper perſon to receive ſuch returns, who is to enter them
in a book, and publiſh them, or an abſtract, weekly, in the *Londo*
Gazette, and four times a year make certificate of ſuch returns to th
clerk of the peace of every county, &c.

And an account of the quantities of corn exported and importe
from and to *Great Britain* to be tranſmitted annually, and kept b
the perſon appointed to receive and publiſh the returns of the price
above-mentioned.

13th of his preſent majeſty, *c.* 43. The preamble recites, tha
" whereas the ſeveral acts of parliament heretofore made, concern
" ing the duties and bounties reſpectively payable on the importa
" tion and exportation of corn and grain, have greatly tended to th
" advancement of tillage and navigation, yet nevertheleſs, it havin
" been of late years found neceſſary, on account of the ſmall quan
" tities of corn and grain in hand, and the ſhortneſs of the crop
" to ſuſpend the operation of thoſe laws by temporary ſtatutes
" whereby the benefits derived from the ſaid acts of parliament hav
" been, during ſuch emergencies, withheld and ſuſpended: An
" whereas the regulating the importation and exportation of cor
" and grain by a permanent law, under ſuch general rules and pro
" viſions as might render, for the time to come, ſuch temporar

" law

" laws unneceſſary, would afford encouragement to the farmer, be " the means of encreaſing the growth of that neceſſary commodity, " and of affording a cheaper and more conſtant ſupply to the poor, " and preventing abuſe in that article of trade; be it enacted, *&c.*"

The act goes on, that whenever the prices of ſeveral grains, *&c.* mentioned in the act, ſhall appear, according to the methods directed by the ſeveral acts of parliament, or after directed by the ſaid act, to be as mentioned in the act, *viz.* middling barley *at* or *above twenty-four* ſhillings a *quarter*, all *duties* and cuſtoms payable reſpectively on wheat, *&c. barley*, *bear*, ſhall reſpectively *ceaſe*, *determine*, and be *no longer paid*, or *payable*, *during* the *reſpective continuance* of *ſuch reſpective prices* as aforeſaid. And certain duties, mentioned in the act, are to be in lieu; to wit, ſix pence *per* quarter on wheat, two pence *per* quarter on all *barley* and *bear*, *&c.* and ſuch wheat, *&c. barley*, *bear*, *&c.* may be carried coaſtwiſe, and entered or landed *in any other ports* of this kingdom, *where* the prices of middling corn, grain, or flour, are *at* or *above* the reſpective rates aforeſaid, and *aſcertained* in the manner aforeſaid; under ſuch regulations as at the time of making the ſaid act.

That by the act of his preſent majeſty, the act of *W. & M.* is referred to, and the exportation is regulated at the prices at the port of *London*, and that the uſage down to 1770 has been ſo, and is found by the verdict; but that the act of 1770 altered the rule.

That the regiſtering act of the tenth had a different object than the bounty on importation or exportation—to fix permanently the limits of exportation or importation.

The act of the thirteenth of his preſent majeſty recites the convenience of a permanent law.

Then the practical rule of the ſtatute of *W.* ſtood unaltered, of eſtimating the price at the exporting port, which here was *London*.

It was contended, that the price of corn has ever varied in different parts of the kingdom; but it was not meant the average plenty or ſcarcity ſhould be the rule of the bounty to be allowed at a particular port. That it might be the rule for ſtopping exportation in a diſcretionary way; but till the exportation was prohibited, the bounty annexed would depend on the price at the particular port from whence the barley, bear, or other articles mentioned in the act were to be exported.

As to the policy, that if an exporter from a plentiful market were to be confined to the price at a ſcarce market, corn would remain a drug; it would be uſeleſs to the owner, and to the public in general: Whereas otherwiſe it might turn the balance in favour this kingdom, in commerce with others.

That as to any combination which it might be ſuggeſted mig take effect, againſt this the parliament had provided. If the pri falls it cannot be raiſed but by freſh ſupply. When there is an e portation largely made the price muſt riſe, and then there muſt an importation, and the price will ſink to the exporting level agai ſo that the evil will cure itſelf.

That if the *crude* commodity is beneficial to a commercial n tion, the manufactured muſt be a great deal more beneficial. Du large upon the malt; on the beer, when made; and a great mul tude of *hands* employed in the working of it.

If the tenth of his preſent majeſty has made *no* alteration; if t thirteenth reſumes the former *wiſely* eſtabliſhed rule, the plaintiff entitled. It would be very hard, without an expreſs alteration, th a man ſhould be working, at a great expence, with ſuch an unce tainty who ſhould reap the benefit.

That the candour of the commiſſioners of exciſe was to be a knowledged, in putting the plaintiff to this eaſy way of trial: And th they hoped, from the juſtice of the court, that he ſhould recover it. Mr. *Davenport* argued for the plaintiff.

Lord *Mansfield*—You have omitted ſtating this in the ſpecial ve dict; though I thought it had been by *conſent*, as you ſay. As th verdict ſtands the action could not be maintained. Commiſſion takes as money *due* to the crown. It is an error upon the ſpeci verdict, which might have been cured by words of conſent inſerte You can't have an action of this nature (but on payment) againſt officer.

Mr. Juſtice *Aſton* ſaid, that it did not appear whether this w *ſtrong* beer or ſmall, and the bounty was allowed *only* on the *ſtrong*

Mr. Juſtice *Willes* ſeemed to propoſe an amendment by conſen

On the other ſide, Mr. Serjeant *Walker*—That this is not the ca of corn, but *beer*.

The firſt act of parliament material to be conſidered upon th ſubject, ſince the ſtatute of *W.* is the firſt of *G.* 3. which, thoug it refers to the firſt of *W.* 3. does not drop an expreſſion wheth at the price of the port of exportation, or at the average price. B till the tenth, I will take for granted, it was by reference confine to the port of exportation.

But at the making of the latter act the legiſlature perceived the inconvenience. The price from the place of exportation would be a very uncertain ground of the bounty; there might be a very good market in *London*, there might be a glut of corn; they might be obliged to ſink the price: And then, on this conſtruction for which the plaintiff contends, they might be at liberty to export with the encouragement of a bounty, and great quantities might be exported, while, in the mean time, there might be a great ſcarcity of corn in the other parts of the kingdom.

Lord *Mansfield*—Does the tenth of this king vary the bounty on corn, according to the average price?

Anſwer—No, my lord: It alters nothing.

In anſwer to theſe objections it was contended, that average price was merely an ideal price: That though the act does not ſpeak of the price of the beer itſelf, it ſpeaks of the commodity from which it is raiſed.

That the act of the tenth of his preſent majeſty is merely an act of *enquiry:* Varies *no price*; reſtrains *no bounty*; makes *no* alteration of any law exiſting.

That by the 13th they found they had gained the clear exporting and importing rules.

That if the conſtruction contended for againſt the plaintiff was to prevail, either a variation in the act or proclamation ſhould have been made; for that otherwiſe the exporter is brewing to a loſs, expecting profit.

Lord *Mansfield*—My *only* difficulty is, to ſee the ground on which the exciſe has gone: I mean in varying the former uſage.

By the act of King *William*, giving a bounty on the exportation of corn at ſuch a price, the *rule* is by the *exporting port*.

The act of the *firſt* of the preſent king has been governed by the price of barley *at* the *port*.

The *tenth* goes on a very different ground; but whether *politically* or not has been ſince doubted, and it is not material to ſay.

The parliament determined to ſee, perhaps, how far exportation or importation might be allowed; and, perhaps, to make new laws.

6 U

Then the 13th determines the price of barley; and the boun upon *beer* is to be governed by it.—If the parliament had meant make a difference, it would have coſt them but three words; th could have ſaid "*the average price*" was to regulate the *bounties.*

The *revenue* laws are generally attended to. *They have ſaid* *ſuch thing.* If the *original* rule was (as admitted) by the *port ex* *porting, I ſee nothing ſince* that *can* have *varied it.*

Mr. Juſtice *Aſton* obſerved, that the rule was according to th ſtatute of 1 *W.* which was recited by 1 *G.* 3. Then, as to the ac on the 10th and 13th, what has a man at the port of *London* to d with knowing the *average* price of barley?

The *ſame* words are to receive the *ſame* conſtruction, if nothin appears to alter; which, I confeſs, I am not ingenious enough find.

Mr. Juſtice *Willes*—That the 13th purſued the former rule.

Mr. Juſtice *Aſhburſt*—That the caſe would be the ſame as if had ariſen a year after the *firſt* of the preſent king, which is evidently governed by the *firſt* of *W.* and nothing ſince which ca *vary.*

Curia—You muſt take it by *conſent*, without exception to th *form* of the *action*, or the circumſtance of it's not being ſaid whether *ſmall* beer or ſtrong. I mention it for the ſake of the *precedent:* For it would be attended with terrible *inconveniences* if an action for *money had and received* could be brought againſt an *offic* acting under theſe circumſtances.

Note, For ſtatutes reſpecting corn, vide 51 *H.* 3. *ſt.* 6. *anno* 1266 34 *E.* 3. *c.* 20. 1 & 2 *P.* & *M.* *c.* 5. 17 *R.* 2. *c.* 7. 4 *H.* *c.* 5.

At what prices exportation to be permitted, vide 15 *H.* 6. *c.* *anno* 1436. which allowed exportation when wheat was at ſix ſhillings and eight pence a quarter, and barley three ſhillings, which rather leſs than a ſixth part of the price at which wheat is forbidde to be exported by the 13th of his preſent majeſty; and rather le than a ſeventh of the price at which barley is permitted to be exported by the ſame act of his preſent majeſty: So great an effect h been produced in 337 years, by the encreaſe of ſpecie, and oth cauſes, in lowering the value of money; and ſo little at the ſam time does the *relative* value of wheat, compared with barley, appe to have altered. Vide alſo 20 *H.* 6. *c.* 6. 23 *H.* 6. *c.* 5. 5 & 6 *E.* 3. *c.* 14. 1 & 2 *P.* & *M.* *c.* 5. And it is very ſurprizing, that this laſt ſtatute appoints preciſely the ſame price at which corn may be exported as the 15 *H.* 6. *c.* 2. had done, ſix and eight pence *per* quarter for wheat, and three for barley, at the diſtance of 118 years from the ſtatute of *H.* and not more than 219 from the 13th of the preſent reign. This no difference in the firſt period, and a difference of ſix to one in the latter, within leſs than double the ſpace of time, I ſuppoſe muſt be aſcribed partly, as to the former, to the plenty and cheapneſs of corn, which the politic expedient of *Henry* the Seventh, in encouraging *ſmall farms*, had produced; and in great meaſure, as to the latter, to the vaſt introduction of commerce in the reign of Queen *Elizabeth*, and ſince, which has ſo exceedingly diminiſhed the value of money.

1 *Eliz.* *c.* 11. *ſ.* 11. makes no difference as to wheat, but as to barley, refers the ſtandard of allowing exportation to the 5th and 6th *Ed.* 6. which had placed it at 3 *s.* 4 *d.*

5 *Eliz.* *c.* 5. entitled an act touching politic conſtitutions for the maintenance of the navy, advances the ſtandard of exportation to ten ſhillings for wheat, and ſix and eight pence *per* barley: So that, as to barley, it doubled in only five years; and of wheat it raiſed the ſtandard of exportation one fourth: And the relative value between them, inſtead of two to one, and rather more, appears to have ſtood at three to two. This was in the year 1562; but in thirty-one years after, *anno* 1593, the ſtandard for exportation of wheat had doubled, and was riſen to twenty ſhillings; and barley was nearly doubled, for from ſix and eight pence it was riſen to twelve ſhillings.

In 1604, four years after the eſtabliſhment of the *Eaſt India* company, 1 *Ja.* 1. *c.* 25. *ſ.* 26. the ſtandard for wheat roſe to twenty-ſix ſhillings and eight pence, (an encreaſe of above one-fourth in thirteen years) and barley to fourteen ſhillings, which advanced the ſtandard of that one-ſeventh, and brought their relative value pretty near to the old proportion of two to one.

Anno 1623, in nineteen years more the ſtandard of wheat was carried on to thirty-two ſhillings per quarter, (an advance of one-fifth) and barley to ſixteen ſhillings, (an advance of one-ſeventh) and their relative proportions ſtood now preciſely as two to one, as they had done in the 4 & 5 *Edw.* 6. and as they had nearly done in 15 *H.* 6. In 3 *Car.* 1. *c.* 4. *ſec.* 24. it ſtood unaltered; there was but four years between this and the precedent ſtatute; but in five years of Queen *Elizabeth*'s reign how great the variation is already remarked.

But in 12 *Car.* 2. *c.* 4. *ſec.* 11. *Anno* 1660, we find the ſtand ard for exportation of wheat at forty ſhillings, and for barley twenty ſo that in thirty-ſeven years the ſtandard of wheat had riſen ne one-fourth, and of barley one-fourth above its former height: An in one hundred and eleven years from 4 & 5 *E.* 6. it had riſen as wheat to ſix times, and as to barley the ſame. And by 15 *Car.* *c.* 7. *anno* 1663, entitled an act for the encouragement of trade, th ſtandard of wheat ſtood ſo high as forty eight ſhillings, or ſeve times the ſtandard of 15 *H.* 6. and barley twenty-eight or abov eight times the ſame ſtandard.

Cole *againſt* Ingold.

Bill of Exchange.

ACTION upon a bill of exchange by the drawee of a pr miſſory note againſt the acceptor.

Objection upon demurrer to the firſt count that a *drawee* upon bill of exchange may come as indorſee againſt the acceptor; but muſt be when acceptor has effects of *drawor* in his hands acceptor is entitled to recover over againſt drawer if not ſatisfied.

On the other ſide that the count was *good*, and they were goin to argue.

Lord *Mansfield*—Nothing in it: The acceptor ſays he has value and if he has not effects our law is very good, he will not recov on the *bare* ſignature. I don't know that "VALUE RECEIVED" w *neceſſary* upon the count; *primâ facie* acceptance is evidence of va lue received; though you may ſhew, as in all caſes, *why* the plain tiff *is not* entitled. *Upon action on the caſe*, the *plaintiff muſt alway recover upon the juſtice of his caſe.** Don't you bring a *thouſand* ac tions upon a promiſſory note, and they ſhew there was *no conſidera tion*; and that the plaintiff had notice there was *no conſideration*.

Note, The doctrine of bills of exchange being important and in fre quent uſe; I hope I ſhall be excuſed in adding the following note con cerning it, conſiſting of rules collected from deciſions in the books.

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* Sunt jura ſunt formulæ de omnibus rebus conſtitutæ ne quis aut in gene injuria aut ratione actionis errare poſſit; expreſſæ ſunt enim ex unius cujuſq damno, dolore, incommodo, calamitate, injuria, publicæ a prætoræ formulæ quas privata lis accommodatur. Vide the paſſage of Cicero pro Q. Roſc. cited the motto to the 2d vol. of the Dialogues on the Law and Conſtitution of E gland.

Actio ad privatam litem ex æquitate legis accommodata quæ *actio caſus* noſtr tibus dicitur ſemper prout juſtitia ex æquo et bono temperata poſtulat, operatur

Indorſe

Indorſee of a bill of exchange may be a witneſs. For mere indorſement of the name only does not transfer property. Vide *Salk* 130. *Lucas* v. *Haynes*, *Paſch.* 2 *Ann. B. R.* and vide *ſupra Clark* v. *Pigot*, *Salk.* 126. 8 *W.* 3. to the ſame effect.

Bill thus "pay to me or order" is a bill of exchange without more if accepted. *ſed* vide caſe below.

Butler v. *Crips*, *Tr.* 2 *Ann. B. R. Salk.* 130. Declaration on firſt bill want of averment, that 2d and 3d not paid would be fatal; but ſhall be aided after verdict. 1 *Salk.* 130.

Of bills of exchange that they need not be ſtamped. Vide 5 & 6 *W.* & *M. c.* 21. *ſec.* 5.

Of inland bills proteſt for non-payment. Vide 9 & 10 *W.* 3. *c.* 17.

Proteſt needs not be ſet forth in the declaration. *Salk.* 131. *Mic.* 2 *Ann. B. R. Borough* v. *Perkins.* 6 *Mod.* 80. S. C.

For non-acceptance, vide 3 & 4 *Ann. c.* 9. *ſec.* 4. which act gives the like effect and remedy to promiſſory notes.

Bill of exchange is not diſcharge of a precedent debt, unleſs it is part of the contract that it ſhould be ſo—*Clarke* v. *Mundal*, 3 *W.* & *M. Salk.* 124. But by the laſt mentioned act it is non-payment unleſs acceptor takes due courſe to obtain payment, and make his proteſt as there provided. Vide *ſec.* 7.

Bill payable to *A.* or bearer not aſſignable to charge the drawer; but good as between indorſer and indorſee; and the indorſement in the nature of a new bill. Drawer of a bill is a merchant *pro iſtâ vice* and for that purpoſe. *Hodges* v. *Steward*, *Paſch.* 3 *W.* & *M. Salk.* 125.

But *quære* as to the 5th point of a general *indebitatus* not lying upon ſuch bill of exchange for want of conſideration averred, and its being but *nudum pactum*; for though a promiſe by parol without conſideration is but *nudum pactum*, and will not bind in law. (Vide Doctor and Student) Yet when it is cloathed in writing (I do not mean by deed) the law will ſee ſufficient certainty and will enforce the payment. Vide the caſe in Sir *James Burrow*, of *Pillans* and *Roſe*, v. *Van Merop* and *Hopkins*, and the whole doctrine very fully and excellently laid down from page 1670 to 1672. And upon the authority of that caſe, one ſimiliar was determined a term or two ago, which I propoſe to inſert in it's place.

Acceptance of a bill by one partner binds both, if it concerns th joint trade; otherwiſe not. *Pinkey* v. *Hall*, *Salk.* 126.

That indorſer is liable only on default of drawer, reſolved by Ho Chief Juſtice. *Mic.* 10 *W.* 3. *ibidem.*

Drawer not chargeable, unleſs he hath notice of drawee's no payment in a convenient time. *Allen* v. *Dockwra*, *Mic.* 10 *W.* *Treby* Chief Juſtice. *Salk.* 127.

Promiſe to pay *ſecundum tenorem billæ* after the day paſt, impo ſible: Yet it ſhall be performed expreſs, for it operates as a gener promiſe to pay the money. *Jackſon* v. *Pigot.* 10 *W.* 3. *Salk.* 12 And vide *Mitford* v. *Wallicot.* 12 *W.* 3. *Salk.* 129.

Paſch. 11 *W.* 3. Held by *Holt* Chief Juſtice, that on an actio on a bill of exchange there was no need to prove the drawer's han because if the bill was forged, ſtill indorſor was bound to pay it.

But 2dly, the plaintiff muſt prove he demanded of drawer *drawee*, and he refuſed; or that he ſought, and could not find him

3dly, That in a convenient time; which, for foreign bills, held to be *three days*, and no allowance for *Sundays* or holidays.

4thly, That in *fairneſs* he ſhould give *notice*; and, as it no ſeems, in law he *muſt*.

5thly, Demand muſt be proved ſubſequent to indorſement.

6thly, That if a man indorſes on a *blank* bill, he puts it in th power of indorſee to make what uſe of it he chooſes, either as a acquittance to diſcharge the bill, or as an acceptance to charge th indorſor.

7thly, That in bills purchaſed by diſcount, bill payable to *A.* bearer, is an abſolute purchaſe; but to *A.* or order, and indorſ blank, and filled up with an aſſignment, indorſor muſt warrant, if no diſcount. *Lambert* v. *Pack.* 11 *W.* 3. *Salk.* 127.

Declaration againſt drawer good without an *expreſs* promiſe; f there is an *implied* promiſe in law. *Starkey* v. *Cheeſeman.* 11 *W.* *Salk.* 128.

Clark v. *Martin*, and *Pollet* v. *Pearſon.* *Salk.* 129.

The

Theſe two caſes, a promiſſory note not binding before the ſtatute, ſeem not to have been law, and the principle *ex nudo pacto non oritur actio* miſtaken, *v. ſupra* to the contrary of thoſe caſes.

Courſe of foreign uſance muſt be averred upon foreign bills, *Salk.* 131. *Buckley* v. *Cambell. Hil. 7 Ann. B. R.*

A. indorſes notes in ſatisfaction of a debt, which notes are accepted; and before receipt of the money drawer breaks: Indorſor ſhall be liable, and not acceptor.

And by general law every indorſement is a new bill, and all and every the indorſors are liable as a new drawer; but that by cuſtom the indorſor may be only liable on default of the firſt drawer.

Indorſor is not diſcharged but by actual payment; or neglect or default of indorſee to receive in convenient time, which in foreign bills was held uſually three days, and that it ought to be the ſame of inland; but that this would vary according to the uſage amongſt traders, and the circumſtances to be conſidered by the jury.

And laſtly, that aſſignment of note payable to *A.* without the words "or order," charges indorſor, and not the drawer. *Hill et al.* v. *Lewis. Salk.* 132.

Indorſor makes himſelf liable in the ſame manner as drawer; and therefore no need to aver that money was demanded againſt drawer or firſt indorſor, in order to charge a ſecond. *Harry* v. *Perrit, Tr. 9 Anne.*

On an action on a bill of exchange it is not neceſſary but rather ſuperfluous to ſet forth the cuſtom at large. *Soper* v. *Dible. Raym.* 175. 8 & 9 *W.* 3.

Note payable to *A.* or bearer; bearer cannot maintain an action in his own name, becauſe of the inconvenience; for then any who finds it might; otherwiſe of note payable to *A.* or order, for that is certain. *Nicholſon* v. *Sedgewick.* 9 *W.* 3. *C. B. Raym.* 180.

Special cuſtom of merchants ought to be pleaded on action on a bill of exchange; otherwiſe of general. *Bellaſis* v. *Heſter. Raym.* 280. 9 *W.* 3.

Bill not indorſable of part without acknowledging ſatisfaction of the reſt; for a man cannot apportion a perſonal contract, to make a man liable to two actions, where by law he was liable to one only. *Hawkins* v. *Cardy. Mic.* 10 *W.* 3. *Raym.* 360. *Sed. v. Wegerſtoffe*

and *Keene*. *Str* 214. which ſeems to the contrary.——Before decl
ration of acceptance the bill was due, and evidence of acceptan
after the day of payment. Plaintiff ſhall not recover; for his ev
dence does not maintain his caſe. *Jackſon* v. *Pigot*. *Raym*. 364.

Indorſee of a bill receives money for it; this is a ſale of the bil
But if he had indorſed it, he would have become a new ſecurit
Governor and Company of the Bank of England v. *Newnham*. *Ea*
11 *W*. 3. *Raym*. 443.

Of days of grace, vide *Mutford* v. *Walcot*. *Raym*. 574.

No proteſt for non-payment before the day. *Anon*. *Raym*. 74
But for better ſecurity it may. If indorſee accepts the ſmalleſt ſu
from the acceptor he can never reſort to the drawer. *Taſſel* v. *Lew*
Raym. 743.

A foreign bill ought to be proteſted on the laſt day of paymen
or if the laſt be an holiday, then on the ſecond of the three da
Ibid.

Bill payable to *A*. or order held not a bill of exchange by Lo
Holt. *Raym*. 757. *Clerke* v. *Martin*: But I take it this is not no
held to be law, but the contrary.

A ſervant cannot receive a note inſtead of money, without
maſter's conſent. *Ward* v. *Evans*. *Tr*. 2 *Ann*. *Raym*. 930.

A bill payable upon a contingency, not a bill of exchange;
to be a bill of exchange it muſt be negotiable. Vide *Jenny a*
others againſt *Herle*. *E*. 10 *G*. *Raym*. 1361. So if out of a par
cular fund. *Ibid*.

Promiſſory note to be accountable to *A*. or order, for 100*l*.
lue received, held a good bill of exchange. *Morris* v. *Lee*. *E*. 11
Raym. 1396.

So to pay 101 *l*. value received of the premiſſes in *Roſemary-la*
Burchell's caſe. *Mic*. 2. *G*. 2. *Raym*. 1545.

Bill to pay out of fifth payment when it ſhould become due h
not a good bill of exchange. *Haydock* and *Lynch*. *M*. 3 *G*. 2. *Ra*
1563.

Declaration need not aver that defendant ſigned the note. [or bi
Elliot v. *Cooper*. *M*. 11 *G*. *Raym*. 1376.

P

Promiſſory note jointly or ſeverally, in the alternative, held bad. M. 2. G. 2. *Raym.* 1544. *Neale* and *Ovington*.

What will amount to acceptance. *Wilkinſon* v. *Lutwidge*. *M.* 12 *G.* St. 648.

A man cannot be ſued here on acceptance of a bill of exchange abroad, after he has been diſcharged by the laws of the country. *Burrows* v. *Jemino*. *M.* 13 *G.* 2. 2 *Str.* 733.

Indorſee indulges acceptor with time: This is at his own riſque, nd not of the drawer. *Gee* v. *Brown*. *Str.* 792.

Not neceſſary to aver acceptance of a bill in writing. *Erſkine* v. *Murray*. *M.* 2 *G.* 2. *St.* 817.

Parol acceptance ſufficient in an action againſt acceptor. *Lumley* v. *Palmer*. *M.* 8 *G.* 2. *Str.* 1000.

Acceptance to pay when goods ſold held good. *Smith* v. *Abbot*. E. 14 G. 2. *Str.* 1152.

Acceptance to pay as remitted not good. *Banbury* v. *Liſſet*. 14 G. 2. *Str.* 1212.

Indorſor may be charged without reſorting to anſwer. *Str.* 441. *Bromley* v. *Frazier*, and a very good reaſon given, that this ſeems o have been one of the ends of making them aſſignable.

Contempt to take out execution both againſt drawer and indorſer. *Windham* v. *Wither*. *E.* 8 *G.* 2. *Str.* 515.

The order of an indorſee may ſue, as upon a general indorſement o himſelf. *Acheſon* v. *Fountain*. 9 *G.* *Str.* 557.

Intereſt on bill not allowed without proteſt. *Harris* v. *Benſon*. 5 G. 2. *Str.* 910.

Where a man has owned his hand to an indorſement he ſhall not et up forgery, by ſimilitude of writing. *Cooper* v. *Le Blanc*. *Str.* 051.

In actions upon inland bills, brought by indorſee againſt indorſor, laintiff ſhould prove demand, or due diligence, to get the money om the acceptor; but he needs not from the firſt drawer. *Heylin* nd *Adamſon*. 4 *Bur.* 675, 678.

Evidence of cuſtom receivable to explain doubtful law, but n to countervail eſtabliſhed. *Edie and another* againſt *Eaſt India Company.* 4 *Bur.* 1228.

Upon death of indorſee the intereſt goes to his executor. Vid the ſame caſe.

Bill of exchange forged and paid by drawer to indorſee, on valuable conſideration, he cannot recover againſt indorſee. *Price* v *Neale.* 4 *Bur.* 1357.

To ſhip fortune or bearer negotiable. *Grant* v. *Vaughan.* 1516

Mortgage.

Vide Herle's caſe, 1 P.W.

ON an application upon the ſeventh of *G.* 2, that upon payment of mortgage-money, principal and intereſt, proceeding in ejectment might be ſtaid.

Againſt the motion—That this was a leaſehold eſtate, ſubject to bond debt, and conſiderable ſimple contract debts; which deſcended to executors holding from the mortgagor: And that, as in caſe of a heir who was liable upon a bond debt, applying to a court of equity for redemption, he would not be ſuffered to redeem without paying what was due upon bond as well as upon mortgage, principal and intereſt, ſo here, the court exerciſing under the ſtatute an *equitable* juriſdiction, would not ſuffer the payment of principal and intereſt on the mortgage debt only to be good, ſo as to releaſe from the mortgage without payment of the debt alſo upon bond. And that it is ſo in the caſe of executors ſucceeding a leſſee.

The act of parliament of 7 *G.* 2. has a clauſe, that this power of the court of law, given by the act, ſhall not be extended unleſs mortgagee gives *notice* of what he inſiſts on. Application upon motion is not notice, within the meaning of the act.

The only caſe in a court of law was that in *Strange*; was that of *Stafford.*

Pr. Ch. 89.

Lord *Mansfield*—That is the very caſe in *Strange*. They don't take debt upon bond, unleſs againſt the heir; but no two characters can be more different than purchaſor and heir. I don't ſee that caſe would decide on this; for they are very different.

Mr. *Buller* further argued—That they could not ſee what was due.

Lord *Mansfield*—I ſuppoſe you have the title deeds in your poſſeſſion, on the part of the plaintiff. Have you any caſe of taking debt againſt executors?

Mr. *Buller* ſaid he thought the rule ſo general, that he did not cite.

Lord *Mansfield*—I believe ſo far otherwiſe, that it has *many* qualifications. What! take ſimple contract debts againſt judgment and bond creditors!

1 *Peere Williams*, 777, was cited. [Which is the caſe of *Coleman* and *Winch*; and Lord *Macclesfield* is there reported to have ſaid, that if teſtator, being poſſeſſed of a term, mortgages to *A.* and alſo becomes indebted to *A.* upon *ſimple contract*, and dies, his executor, bringing a bill to redeem, ſhall pay both the mortgage and the debt by *ſimple contract*, becauſe the very equity of redemption is aſſets to pay ſimple contract debts.]

Lord *Mansfield* deſired the caſe might be ſent for out of Chancery. And, on looking into the caſe, he ſaid it was confined to the inſtance of there being no creditors of a *ſuperior* nature.

He added farther, that the court would ſay on what terms he ought to redeem; and the terms would be juſt the ſame as in equity.

Here is an attorney; the deeds are in his poſſeſſion; the money upon bond; the bond, I think, he ſtates to be for money lent to carry on buſineſs. Has the bill been delivered?

Enlarge the rule: Your debt is ſufficiently ſecure. Let the executors make affidavit of the aſſets in their hands.

Mr. *Buller* deſired they might know what paſt, or whether the whole of the premiſſes was ſubject to the mortgage, which as executors they could not know.

Lord *Mansfield*—They won't let you ſee their title unleſs you agree o pay the money.

Mr. *Buller*—That they might ſhew an abſtract.

Lord *Mansfield*—You won't get *that* without agreeing to pay.

If you find it was money charged for procurement of a mortgag which was his own money, it will be very ſtrong: It will be li the ſtory of the man who charged porterage for the turkey whi his client ſent him as a preſent out of the country.

Inſolvent Act.

IN a caſe of inſolvency, Lord *Mansfield* ſaid, he remembere Lord *Hardwicke* directed the city marſhal to ſell his place.

[So that it ſeems where places can be ſold by permiſſion they a to uſe their endeavour to obtain that permiſſion, before they ca claim the benefit of the inſolvent act; for the act, it was obſerved diſcharges them on theſe terms; *doing all in their power.*]

Information.

Libel.

UPON motion for an information for a libel publiſhed again the Hon. Mr. *Charles Fox*; on ſhewing cauſe to the rule, th printer declared he was not privy to the contents, nor to it's bein put into the paper; and was greatly concerned it ſhould ever hav been publiſhed, and ſtopped the ſale immediately when he diſcovered it: And hoped, therefore, that the court would not grant th information.

Lord *Mansfield*—It goes for nothing, and would be an excuſe fo all ſorts of infamy.

RULE ABSOLUTE.

Certiorari.

MOTION for a *certiorari* to remove an order of ſeſſions, and an order of two juſtices confirming that order.

Objection—That it does not appear on the affidavits that application was within ſix months.

Anſwer—The juſtices are ſerved with notice.

Rule to ſhew cauſe. But on it's appearing by the affidavits that it was a rule to remove an order of the laſt quarter-ſeſſions, and of courſe muſt have been within ſix months.

Rule absolute inſtanter.

Bail.

IN a caſe concerning diſcharge of bail the court was of opinion, that the bail never went farther than as a ſecurity in the original action. Therefore, when judgment cannot be opened in the original action, the bail ſhall not be liable.

In the caſe of bail above, though you declare upon the condemnation money, you never recover more than the debt.

Attorney.

MOTION, that attorney ſhew cauſe why *debt* and *coſts* ſhould not be recovered againſt him for neglect.

Mr. Juſtice *Aſton*—We cannot make ourſelves *judge* and *jury*: An *action* is *open*. We will not try it in a *ſummary* way, and take the deciſion of debt and coſts in our own breaſts.

Mr. Juſtice *Aſhhurſt*—If there were any thing corrupt, that might have been a ground: But it is in a jury's breaſt, upon the circumſtances. Perhaps they would think the man who was ſued was worth nothing; and therefore nothing to be got from him, and they might not make the attorney liable to the whole debt and coſts.

Injunction out of the Exchequer.

IT was obſerved, that where an injunction is moved in the court of Exchequer, you may move to try the cauſe, ſtaying execution till the merits of the injunction be determined.

Lord *Mansfield*—The general injunction in the Exchequer ſtays trial. And where the defendant is *beyond ſea*, there, though his cauſe were ever ſo plain, the court of Exchequer granted an injunction till his anſwer came in. The exceptions to be ſent to *Rome*, *Grenada*, or elſewhere, to be anſwered. And thus, where moſt ample juſtice ought to be done, in the caſe of foreigners, a man might be kept out of the *cleareſt* and *plaineſt* juſtice of the caſe. But late years the barons, I believe, have corrected this. And now th will not grant an injunction in the caſe of a foreigner, unleſs up hearing affidavits on the merits.

ON a motion to ſhew cauſe why defendant ſhould not be di charged on debt and coſts having been paid, and why a com mon bail ſhould not be accepted.

Arreſt on *meſne* proceſs; and defendant contended that he ha been arreſted again for the *ſame* debt.

And that he is detained in cuſtody contrary to an agreement of th plaintiff.

Contended on the other hand, that they were ſeparate debts; fo that he had aſſigned his effects to the plaintiff, and then the ſam day gives a warrant of attorney to confeſs a judgment; whereupo *another* creditor entered, and had execution of *all* the effects.

Mr. *Dunning*—That the nature of the proceedings ſhews the de fendant is not under an arreſt for the ſame debt; the one being a joi action, and the other a ſeparate.

As to agreement—That on application at judge's chambers to diſcharged, as having been twice under arreſt for the ſame debt, h failed.

That the plaintiff has only got 500*l.* for 2,700*l.* and has n hopes of any further remedy, unleſs by keeping his ſecurity, an retaining the defendant in cuſtody.

That the defendant is endeavouring to defeat all the ends of th agreement, ſo far as it was beneficial to the plaintiff, and to mak his own advantage of it, without complying with the terms.

That all his creditors, as well as the plaintiff, would be diſap pointed; the aſſignment being for the common benefit of all.

That he ſhould rather have moved to have diſcharged the ru with coſts, but that the plaintiff was already creditor for ſo large ſum, and far from likely to recover the whole, much leſs coſts: S that he feared that part of the motion would be troubling the cou in vain.

Lord *Mansfield*—There is no diſpute between the parties previo to this application, but upon delivery of the books. Another thi ſet up ſince is, defendant receiving the debt, and ordering creditors not to pay. Now the only thing ſworn to (farther than information and relief) is a ſingle ſum: And the ground, after all, on which they went was, that the books were *not* delivered *according to the agreement*. So ſays the plaintiff; and, on the other ſide, the defendant ſays they were; but the plaintiff would *not* comply with the agreement upon the delivery up, and diſcharge him.

I think the plaintiff has been *wrong*. The defendant might have been obliged to aſcertain the books by a ſchedule; and farther, to have delivered them upon oath. Therefore, upon delivering the books before maſter, upon oath, the defendant ſhould be diſcharged out of cuſtody.

Blandford *againſt* Froſt.

MOTION to ſtay proceedings on a *capias ad ſatisfaciendum*, and that defendant might be diſcharged out of cuſtody, for want of proceeding, within two terms after judgment.

This motion was grounded upon a rule, *Trinity* term, 2 *G.* 1. that priſoner, if not declared againſt within two terms, ought to be diſcharged; or if declared, and no farther proceedings within three terms; or if execution not taken out within two terms after judgment.

Like rule in the Common Pleas, 8 *G.* 1. twelve years after another rule to diſcharge from arreſt.

Caſe cited, *Boulter* and *Salmon*, defendant ſuperſeded, for want of being charged in execution.

Contended, that no party can after a ſuperſedeas be taken in cuſtody, on any after judgment, by an action brought by the ſame plaintiff upon the former judgment. And that the practice was univerſal.

Mr. Juſtice *Aſton*—That the practice, ſo far from being *univerſal*, the officer ſays there is *no* inſtance. And the two caſes from the books go to the *contrary*. *Bonywell* againſt *Howlett*, 13 *G.* 2. never determined. Queſtion, whether the body of the defendant was liable to be detained, he having been before in cuſtody, and diſcharged out of execution. Juſtice *Lee* thought that his *body* ſhould *never be liable again*. Mr. Juſtice *Denniſon* doubted there being a judgment upon coſts alſo, whether the court could prevent his body being taken in execution.

I will conſider of it.

Mr. Juſtice *Willes*—It ſeems to ſtand upon the ſame reaſon as ſuperſedeas before judgment.

Afterwards, on the 14th of *May*, in the ſame term.

Lord *Mansfield*—We have looked into this caſe; which was a ru to ſhew cauſe why defendant ſhould not be diſcharged out of cu tody, *&c.*

In the caſe of *Wright*, adminiſtrator, againſt *Keſwell*, a diſtin tion is taken between execution upon *meſne* proceſs, and after jud ment. And the court, on the whole, thought defendant charg able after a ſuperſedeas upon *meſne* proceſs; but not after *final* jud ment was ſuperſeded.

Boulter and *Salmon*. There the caſe was exactly the ſame as this caſe; but nothing done, becauſe there was no application bring him up.

Upon looking into the rule *Hil.* 8 *G.* 2. I think nothing mo was meant than to prevent defendant being held to bail; becauſe provides for a common appearance to be entered.

In the caſe *Mic.* 1745. defendant was not charged in due tim And upon being diſcharged, queſtion, whether he ſhould be charg in cuſtody upon action upon the former judgment. *Lee*, *Ryde* and *Denniſon*, thought plaintiff ſhould not have the benefit tak from him: *Wright* otherwiſe; for ſo the Lords act might be evade Adjourned.

Str. 943. It appears no ſuch evaſion was allowed. But in the ca in the year 1745. At nine o'clock, on the adjourned day, the cou determined he might be charged in execution, having never bee charged before.

Therefore, upon the authority of that caſe, and the ſenſe of th rule, my brothers are of opinion that this RULE ought to be DIS CHARGED.——*Quære amplius, amice lector.*

Mandamus.

ON a motion for a *mandamus*, to reſtore to the office of maſter of a free-ſchool in *Northampton*.

The application ſet forth the manner of chooſing, and that he was accordingly choſen, and had continued in the faithful execution of his office; and that he ought not to be removed, unleſs for fault or miſdemeanor properly ſignified, and the removal thereon regularly made, whereas there had been no ground of fault or miſdemeanor made out againſt him: And that he was diſcharged without any previous information or defence. And therefore he prayed of the court that he might be *reſtored*. Certificate of approbation of parents, and affidavit of a witneſs who did not approve the removal, and went away before it was done.

Mr. *Manſfield*, againſt the rule—That the ground made to the court to maintain the application for a *mandamus* to reſtore, reſts only on the ſingle affidavit of one of the burgeſſes.

That he does not ſhew he has a freehold in the office; nor what his title; nor whether removable at pleaſure, or not.

That by the 14 & 15 *C.* 2. he ſhould have *ſubſcribed* a declaration of his *conformity* to the liturgy of the church of *England:* And on non-compliance the election is *void*, and he does not ſhew that he *has* ſubſcribed.

And farther, that it appeared, on his own declaration, that he did not trouble himſelf about the ſchool, which was not worth his notice; but for indulging a pleaſure he had in giving trouble to thoſe who removed him. And whether the court would allow him a diſcretionary means of indulging his deſires on ſuch grounds.

That if he obtained the *mandamus*, all he could get, as of right, was only 7*l.* 10*s.* *per annum*; all the reſt depending upon the pleaſure of the corporation.

That they diſcharged the precedent maſter at pleaſure, and that they have *always* been ſo accuſtomed to remove. And if they might remove at pleaſure, the court will find they had very good reaſon to exerciſe their pleaſure in removing this man, and that he very well deſerved to be removed.

The *whole* corporation, who were preſent, removed him, the perſon who joins with him in the affidavit only excepted.

They thought he was, as he had repreſented himſelf, a mar man, about thirty; that, however, it turned out, upon his own c feſſion, being charged therewith, that he was not a married m but cohabited with another man's wife. And thus it is ſtated u the *order* itſelf, whereby they *remove* him.

As to the *certificates*, it's ſworn he told the people he wanted t names as a matter of *form* only.

[Lord *Mansfield*—I ſee one of them who ſigns the certificate *markſman*; who gives his opinion of the proficiency of the child in learning.]

Argued farther, by the counſel againſt the rule—That he had forth no proper *title*; nor did it appear his intereſt in the office wa *freehold*, or any *permanent* eſtate; but that the expreſs contrary appea by the affidavits on the other ſide. And that, as it appears by the he is removable at pleaſure; and that the court muſt ſee he groſsly ſerved to be removed. They will not, it is hoped, grant a *mandamus*, which the return would be "*he was not a proper perſon*:" And other effect could follow.

On affidavits it appeared, that one of the deponents, who ſwe he never ſaw a free-ſchool where the children had made ſo little p ficiency, aſked the ſchool-maſter, on whoſe behalf the *mandam* was applied for, the reaſon of this. And that he ſaid he did n think it a ſchool worth his notice; and believed, ſhould he be rei ſtated, he ſhould not execute the office, as his only view was to gi trouble to the corporation.

Affidavit of the burgeſſes, ſtating the conſtitution of the charit and that the maſter is, and hath been always ſince the foundation the ſchool, removable at their pleaſure. And they ſtate the remov of the precedent maſter; and ſtate the other facts mentioned by t counſel opening; and particularly that he wrote them a letter that was a married man; but they ſay he cohabited with the woma whom he pretended to be his wife, and then left her, and marri another woman. And they ſay that they are *informed, and verily* b lieve, the pretended former wife was the wife of another man: A that *it came out* that ſhe was not *really* his *wife*, and that ſhe went o on a quarrel, with an uſher. And *then* they charge him with bei addicted to tippling and low company, and telling extravagant ſt ries, and talking ſo of himſelf that his veracity was ſuſpected.

They ſpeak to ſavings of an hundred pounds made to the ch rity, by refuſing payments to a maſter who did not execute h duty; and an accumulated ſum of 400 *l.* which they veſted in t funds, for the benefit of the charity. And that, for the better encouragement of a man of proper learning and qualifications to undertake the ſchool, they had encreaſed the ſalary, and enlarged the number of ſcholars from twelve to twenty-five.

They ſtate that, at a meeting of the corporation, he was charged y the mayor of theſe offences of tippling, keeping low company, eing a romancer, and cohabiting with another man's wife; which aſt (and moſt material) charge he *acknowledged*; and endeavoured o juſtify himſelf from being a romancer: But a circumſtance, they id, was related by one of the burgeſſes, in proof of that charge om which he endeavoured to clear himſelf, but gave no ſatisfactory nſwer, and was therefore *diſmiſſed* by *all* the *burgeſſes*, except *Lloyd*, ho made the affidavit in his favour, and went out before they came o vote.

That afterwards *W. J.* was duly elected, in his room, one of their ody; a man of unblemiſhed character, and of *Queen's* college, *Ox-rd*, as they are informed and believe.

Two of the burgeſſes farther ſwear, that *R. B.* the ſchoolmaſter, ho applied for the affidavit, deſired an *inſtrument* might be drawn, *o continue him in his office* for a *certain time*. And that they told him *t would not be permitted, but he muſt take it as his* predeceſſors had one.

The mayor acknowledges *W. J.* above-mentioned was his ſon-in-aw; but ſays that he never uſed any influence in his behalf, to the eſt of his recollection and belief.

Affidavits of parents of the children, charging him with tippling nd romancing.

Another, who believes he greatly neglected the ſchool.

Lord *Mansfield*—As to the objection on the ſtatute 13 & 14 *C.* 2. ow does it *appear* he did *not* ſubſcribe?

Mr. *Dunning* argued, that as a ſufficient ground of a *mandamus*, was only neceſſary a man ſhould be removed from a freehold not ompetent to be determined by that removal: And then, whether *fee* or for an *hour*, if that *hour* unexpired he ſhould be entitled to *mandamus*.

Lord *Mansfield*—There is *no doubt that* is *right*. And I ſtopped Mr. *Bearcroft*, when arguing the neceſſity there ſhould be a free-old.

It has been urged, the diſcovery of his cohabiting with ano man's wife was made in *Auguſt*.

It is admitted that the diſcovery was made in *Auguſt* of his co biting with another man's wife, and that thereon in *October* he diſcharged. If this be true, he was guilty of *romancing*, in ſett himſelf forth as a married man when he was not, but lived in ad tery with the wife of another. And with what authority could talk to his boys of morality? I think the giſt of their ground here: And I don't ſee why it ſhould go farther, if this be ackno ledged, becauſe the only intereſt that can ariſe is from his charac and doing credit to the ſchool.

This will be an expence much greater, perhaps, than the wh property from whence the ſupport is to ariſe.

I underſtand the matter went back to be more fully anſwered the party applying for the *mandamus*, and more fully ſtated on other part: But I believe the court heard no more of it on the applying for the *mandamus*.

Bribe.

IF I lay a wager of five guineas with *A.* that he does not vote me, it is a bribe.

Borough of Portſmouth.

ON a motion, in the nature of a *quo warranto*, againſt ſever requiring them to ſhew cauſe why they claimed to be bu geſſes.

Objections, that there was no ſufficient majority to elect.

2dly, No ſummons.

3dly, That the day on which they were elected was a day a pointed by the charter itſelf for other buſineſs, and not for ele tion.

Mr. *Buller* cited the caſe of *the King and the Borough of Radn* where the court refuſed the information after ſeven years elapſed, an objection taken by the preſiding officer. *The King and Borou of Malmeſbury*, on the objection being made by the town clerk.

On the other ſide—That there was no *univerſal* rule that the court ſhould refuſe an information becauſe the perſon who objected was preſent and privy, and did not immediately apply.

Lord *Mansfield*—The court has *eſtabliſhed*, that after *twenty* years quiet and *peaceable* poſſeſſion, they will not grant an information under their diſcretionary power. It does not *bar* the attorney-general, if he pleaſes. This was done by *analogy* to many other caſes.

The time has been thought too large; and application has been made to parliament to narrow it: But the rule was not diſturbed. In the caſe of *the Borough of Winchelſea* the court was ſtruck ſo much by their going againſt a poſſeſſion of thirty or forty years, that the rule was *then* eſtabliſhed. But the court told the bar at the ſame time, that though *this* ſhould be a *bar*, without any other circumſtances, they would not ſay that, upon circumſtances, they would not refuſe the information within *leſs* time. *No* circumſtances have been *expreſsly* laid down as a *bar*; but it depends upon a variety of circumſtances.

A man ſhall not avail himſelf of an iniquity or blunder of his own. *Allegans turpitudinem ſuam* ſhall not be heard. Maxim.

Another objection has ariſen, by ſuffering a length of time to elapſe, though under twenty years, when *evidence* might be *loſt*, as in the caſe of *reſidence*.

Another, where there have been *many derivative* rights; and *ſtill more material* where the overhauling proceedings for many years would amount to the *diſſolution* of the *corporation*.

All or ſome of theſe circumſtances have operated in the caſes ſince that of *Winchelſea*.

Now let us *conſider* the circumſtances of *this* caſe. The perſon who gives the evidence does not come *diſhoneſtly* to diſturb the peace of the corporation: There is nothing before us of *derivative* title; there is *no* ground from the danger of the *diſſolution* of the corporation; there is no difficulty to prove, as to any evidence of fact. As to the general cuſtom, they may *eaſily* prove it.

It does not appear that the town clerk is intereſted in the election; it does not appear that he gets his intelligence other than *officially*.

With reſpect to the *want* of *ſummons*, there is *no* ſuggeſtion.

What is *moſt material* of all, the town clerk does not come as *proſecutor:* They introduce him as a *witneſs.*

Bail.

A Man brought up as an *accomplice* of *felony*, the *principal* no being taken, may be bailed.

Award.

AWARD under general terms of ſubmiſſion; motion to ſ aſide for a miſtake.

Per curiam—That the miſtake muſt be *plain* and *groſs*, in ord to ſet aſide the award.

Trinity Term,

14 Geo. 3. 1774. K. B.

ON a motion to ſtay proceedings on payment of debt and coſts.

This was upon a bond entered into with truſtees, under a very laudable charity, lately inſtituted for the loan of money to put out apprentices in ſmall trades.

In truſt to lend for *five years* upon bond, any ſum or ſums not *leſs* than *one*, or more than *three hundred* pounds, for putting out apprentices to ſmall trades; *one* pound *per cent.* to be paid for the ſaid loan for the *firſt* year, and *two* the four following.

Condition of *forfeiture* of the double ſum in caſe any one of the ſureties become *inſolvent*, or the principal; or if he change his condition, and give no notice within a month: With divers other conditions.

The truſtees ſued for the *penalty* on *this* bond.

Lord *Mansfield* was of opinion, and delivered himſelf to the effect, as follows:

Though in *common* inſtances the *debt* is the *ſubſtance* and *real demand*, and the *penalty* only the *ſecurity* and *ſhadow*; yet *here* this being a regulation to *ſecure* the *fund* to a *public charity*, lending money on very kind and beneficial terms, for the *encouragement* of *induſtry* and *advancement* of *young* perſons in trade, and by the *ſmallneſs* of the *intereſt*, and poſſibility of *loſſes*, the *fund* being likely, in it's nature, to *fail*, were it not for the incidental aid of the penalties,

The penalties themſelves were all *ſubſtance*, and *not form*: And
forfeiture of the bond ſubjected to the penalties, and not to paym
of the mere ſum only; becauſe theſe were *ſpecial* conditions,
which they received a ſpecial benefit.

Motion.

MOTION to enlarge a rule to the *laſt* day of term,
granted: But the court gave them leave to enlarge to the
day but two.

Error.

From the Common Pleas.

DECLARATION againſt a corporation, for not repairi
banks, *&c.* of a river, as from time immemorial they
been uſed, and ought, whereby the courſe of the river became
ſtructed, and the plaintiff was obliged to carry his corn fart
about. Second count charging as above, and that thereby he
not ſufficient uſe of the navigation, *prout conſuevit et debuit.*

Exception, that they have not ſtated the ſpecial injury by not
pairing, which they ought to ſtate, in order to entitle themſelve

A *river* certainly is as the king's *highway*. And ſo it is laid do
in *Hawkins*.

Davies, 76. Every *navigable* river, ſo far as the ſea flows,
royal river, and the *king* has the *fiſhery* by his *prerogative.*

1 *Mod.* 105. Where the tide *flows* and *reflows*, it is an *arm*
the *ſea*; and *therefore common* to *all.*

And vide *Salkeld*, [I ſuppoſe *Smith* v. *Kemp.*]

Vide Co. Lit. ſ. 68. 5 Rep. 73. Williams's caſe, and 3 & 4 Commentaries, title Nuſance.

The plaintiff, therefore, has no *particular* right, in preferenc
other ſubjects. If this is a *public* highway, the plaintiff ought
have ſhewn ſome *particular* damage to himſelf, to juſtify his acti
And for a common nuſance a man ſhall not have a private actio

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* Lex non amat ſupervacuum.

Eſt boni judicis lites dirimere.

Expedit reipublica ut ſit finis litium propter communem omnium utilita

On the firſt count, indeed, he has ſtated a *particular* injury, in *me meaſure*, by alledging his being obliged to carry corn farther.

But on the ſecond count, only that he has not had *ſufficient* uſe of he navigation, as he ought to have had.

Carthew, 130. *Paine* v. *Patrick*, for not keeping a ferry boat, as efendant had been accuſtomed, and ought of right to do, *&c.* hereby plaintiff loſt his *liberty of paſſage* from ſuch a time to ſuch time. Held, that no *private* action would lie; but that in ſuch ſes there muſt be a *public proſecution* by indictment.

Cro. Eliz. 664. *Fineux* v. *Hovenden.* The principal caſe not etermined: But a caſe is there cited of *Williams* and *Johns*, that here a chapel lies within a manor, and the parſon of the adjoining hurch uſed to read divine ſervice every *Sunday*, for the lord and tenants, in the ſaid chapel, and had failed; and the lord brought his ction on the caſe. *Adjudged*, that it lay not: For otherwiſe every ne of the tenants might (ſeverally) bring the like action, which ould be inconvenient; but he ought to be puniſhed by the ordinary.

5 *Co.* [which ſeems to be the caſe of *Williams* and *Johns*, mentioned by *Croke*] held bad, becauſe not a *private* chapel for himſelf nd family: For his *tenants* were not part of his family.

Obſtruction of a watercourſe, whereby he loſt the uſe of his mill. Here it appearing that it was a *public* river, a *private conſequent* loſs will *not* maintain the action; but the loſs muſt be *immediate* and *direct.*

Lord *Mansfield*—How do you *prove* this a *navigable* river? The water runs here into many people's cellars, but is that a *navigable river?* I don't ſee it's any where ſtated to be a *navigable* river. *Ex facto oritur jus.* Shew me upon the pleading this is a navigable river.

2d *Raym.* 1089. *Tenant* v. *Goldwin.* This caſe was cited, as I ake it, to anſwer the objection, that plaintiff had not ſhewn a title.

E contra, *Salk.* 360 [*S. C.*] If the hundred be indicted it needs not be ſtated how it is chargeable; but otherwiſe of a *private* perſon, who is *not bound* of *common right* to *repair*. And where defendant ought of *common right* to repair, plaintiff needs not to ſhew a title, nor to charge ſpecially. Now here,* therefore, the corporation, who are the defendants, ſhould be chargeable, *eſpecially* as not being liable to repair of common right.

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* Quære, How this action was brought? for a corporation cannot be charged with a nuſance: And indeed, probably, the ground of the judgment might be in part, that the corporation, as being ſuch, was not indictable of nuſance; and therefore the plaintiff muſt have his private remedy.

Lord *Mansfield*—They ſtate, that from *time immemorial* they have been uſed to repair; which *preſumes* an *obligation* to repair.

This is a corporation by *preſcription:* And by the *ſame preſcription* they are bound to do theſe things; and it might be the *original condition* of *their exiſtence.* They muſt have had their *exiſtence* as a *corporation* by *charter*; and preſcription is evidence of what was in the charter, and does not now appear.

JUDGMENT AFFIRMED.

Error. From the Court of Common Pleas.

Harwood *againſt* Goodright.

MR. *Davenport* began with ſtating the judgment in the Common Pleas, and the ſpecial verdict, as ſtated above.

Error brought againſt the judgment, in favour of the leſſor of the plaintiff.

This caſe muſt be argued upon two or three leading propoſitions.

1ſt, After a *clear* title, by the will of 1748, another *good* title is required, to take Mrs. *Harwood*'s eſtate from her.

2dly, The *mere* act of making a *ſecond* will does not, *in itſelf*, revoke the *firſt*, unleſs by *expreſs* words of *revocation*, or *direct inconſiſtency*, or *repugnancy*.

To prove this he cited the caſes already cited and obſerved upon in the Common Pleas, *Cro. Eliz.* 721. *Cro. Ja.* 49. And the famous caſe of *Hitchin* and *Baſſet*, as contained in *Cumberbach*, *Hardreſs*, *Siderſin*, *Salkeld*, *Modern Reports*, and *Shower*'s Parliament Caſes, 146, under the name in the laſt, of *Hungerford* and *Noſworthey*.

That in this caſe a bill had been filed in the court of Exchequer, to remove an extent, whereon an iſſue was directed, and a general verdict found; with which the court was much diſſatisfied. Afterwards, in the Exchequer, they did not find a deviſe of lands, and ſubmitted to the court. In the King's Bench a ſpecial verdict was found: That he made a will, particularly ſtated, and exiſting; afterwards he made *another* will, in writing. *What was contained in that*

that will the jury know not. Determination, that finding a *latter* did not *revoke* the *former*.

That even in Lord *Hale*'s opinion it muſt appear a *ſubſtantive independent* will; that is, it muſt appear *what* it is.

A *different diſpoſition here* is finding no more than *aliud teſtamentum there*.

Lord *Mansfield*—Were any of you here when it was tried before me? They gave evidence of a ſecond will at *Uxbridge*. I left it whether the will was revoked.

No evidence, but a woman, who ſaid ſhe was ſubſcribing witneſs; and a boy, who was preſent, he ſaid.

His Lordſhip ſaid he left it to the jury; if they found ſhe had *deſtroyed* the will, they muſt *preſume* the contents, and put it upon the others to prove the contents.

Mr. *Davenport* proceeded—They did not find that he *did not* deſtroy the will of 1756: They only find *negatively*, that they did not find he *did*. And if revoked, it would ſet up the former.

2d *Atk.* 272. That the ſtatute was an expreſs revocation of all other revocations, except *expreſs*.

The firſt will muſt ſtand, either for the part *unaltered*, or for the *whole*, according to the conſtruction upon *ſeeing the contents*.

The doctrine then has been, ſince and before the ſtatute, that twenty deviſes of lands, by *different* inſtruments might ſtand together, if *not inconſiſtent*.

The law muſt ariſe upon the facts *found* upon the ſpecial verdict *ſimply*. I have no conception of any arguments on the other ſide that will meet with theſe rules, or of force enough to over-rule them.

The firſt trial in the C. P. was before Judge *Blackſtone*. General verdict as before Lord *Mansfield*, and they brought a new ejectment. On the verdict they declared themſelves very *deſirous* to have found the other way, but they thought the law *too ſtrong*.

Lord *Mansfield*—This is the *ſtrongeſt* verdict *poſſible*.

Have you conſidered whether upon a writ of error this court would grant a *venire facias de novo*? In the Houſe of Lords they do:

And I can't ſee the *difference*: (Two caſes were ſtated in which th was done, *Haſwell* and *Challice*, *Kynaſton* and *Corporation of Shrew bury*.)

The *ſuperior* court upon a writ of error can do what the *infri* court *ought to have done*.

Mr. *Davenport* continued—They ſhould find whether this wi was *revoked* at the death; the moſt *trifling* legacy would make *different*, *aliud teſtamentum muſt* mean a *difference*; if they had foun ſhe had *deſtroyed* the latter will, they ſhould have preſumed an thing, but they find *nothing*.

Mr. Juſtice *Aſton* doubted whether there could be a *venire faci de novo*, and mentioned whether they might not try it by conſent— but then he ſaid there muſt be a new trial.

The evidence of a *different* diſpoſition was explained to have bee by parol teſtimony, as it came out before in Common Pleas; how ever ſhe might expect all ſhe was miſtaken, there would be very lit tle for her.

Argued, It was *no* evidence; he was a very paſſionate peeviſh ma and uſed often to ſay ſuch things contrary to his *expreſs* knowledg at the time.

Lord *Mansfield*—The queſtion upon the ſpecial verdict will b whether the court will find for the plaintiff; it will not conclud them from a ſecond ejectment.

It is impoſſible the *Houſe* of *Lords* can do this, of ordering a *ve nire facias de novo*, if *this court can't*; becauſe they ſend back th record, and make it a judgment of this court.

Stood over to the next paper day.

Serjeant *Hill*, for the defendant in error—Queſtion whether upo the whole verdict taken together, there does appear a title out of th whole.

Special verdict was ſaid to be *too much*; but the learned Serjean ſaid, he now thought there was *too little*.

1688, a private act of parliament for ſale of the ſettled eſtates.

He was tenant in tail—if three ſiſters the whole to the three; two 6000*l*. if one 4000*l*. if *none* ſurvived then the whole in him.

H

He would have been tenant in tail, reverſion to himſelf in fee.

He was *unmarried* at the time of making the will; he had two ſiſters who would have had the chance of the eſtate if they had *ſurvived*: He is ſtiled of *Lincoln's Inn*, from whence, if there are to be *preſumptions*, I hope, I may preſume him a *lawyer*. Will ſtated in 1756, ſeveral nephews and nieces in the mean time born. *No alteration at all* in his *property*; and then they find he did make duly publiſh and execute *another* will in writing, *with all the ſolemnities required by the ſtatute*. That the diſpoſition made by the ſaid *John Lacy* in 56, was *different* from the diſpoſition in 48; but in *what reſpects* they are *entirely ignorant*; they don't know the *circumſtantial* difference.

The circumſtances of the family were neceſſary to be taken in; he had the *abſolute* reverſion.

The *election* whether the money ſhould be laid out in lands or not was in him, *Letchmore* v. *Lechmore*. *P. Will.*

Lord *Mansfield*—It is very clear, except in the caſe of *Bowes* and Lord *Shafteſbury*, where the laying the money out in lands, would have defeated the *whole* intent, the deviſee being a papiſt.

Lord *Mansfield* cited a caſe adjudged between Lord *Trelawney* governor of *Jamaica* and *Booth*. *Booth* wanted to borrow 500*l.* he borrowed upon a ſum of 4000*l.* ſtock in Chancery to be laid out in land.—Lord *Hardwicke*, with the *ſtrongeſt* deſire to the contrary, declared it was *land* to all intents and purpoſes, and could *not* be liable to a *ſimple contract* debt.

Serjeant *Hill* continued—If it be to be ſuppoſed money, he had *no real* eſtate, except the eſtate in queſtion the chambers. His will in 1756, was ſubſcribed by *three* witneſſes who *duly* atteſted the ſame; duly I ſuppoſe means, according to the ſtatute of frauds.

Here then is a *different* diſpoſition made of the *ſame* property.

The rules of evidence, notwithſtanding what has been ſaid, are *not altered* by the ſtatute of frauds.

If ſhe had it and produced it not, why this makes againſt her; if ſhe had it not, why had ſhe not, but becauſe it *was againſt her*.

None need ſhow the contents, but thoſe who claim under the will, which the heir does not.

The jury might have found *generally* for the heir, and very re ſonably I think: But they may find *facts* and leave the *law* to t court, who will find whether revocation or not upon circumſtanc and even fraud may be preſumed on circumſtances.

Hardr. 218.

But I do not deſire deſtruction or ſpoliation to be preſumed Your Lordſhip will preſume the will is now exiſtent; and witho imputation upon the heir or plaintiff in error, be the accident wh it may, the heir has no need of producing it; unleſs he were *fault* by *not* producing it.

If nothing may be preſumed, I think there is enough for the d fendant in error upon the verdict.

Before the ſtatute of *H*. 8. there was no ſuch thing as wills in th court,* except by particular cuſtom: The notion and the *word* w borrowed from the civil law. The will therefore by the authori given by the ſtatute muſt be the *laſt* will; and it has in ſuch re pects been interpreted with ſome *ſtrictneſs*: *Habet* is a word uſed it, and therefore a man can't, it is held, deviſe lands which he *b* *not* at the *time* of the deviſe.

The notion of the civil laws was that where there were two will the latter revoked the former; if the firſt was meant to ſtand, was a codicil and not a will.

Swinb. 15. No man can die with *two* teſtaments, becauſe th *latter* does *always* infringe the former; yet a man may die with d verſe codicils.

Swinb. 501.

Perk. 478. A *latter* teſtament does *always revoke* a former.

In the books of civil law, *Swinburne* and *Godolphin*, are many caſe *improperly* called exceptions.

The latter does not make void the former when the latter *imperfe*

When the teſtator was *compelled*—

When by *fraud*.

When by *undue influence*.

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* It means in contradiſtinction to Chancery, where wills were conſidered as a appointment to uſes binding upon the conſcience.

Wher

Where there are *two* wills and the teſtator takes up the firſt, and ſays that is his will.

When the ſecond teſtament does not diſſent from the former.

Where there are no executors for the latter, for then it is only a codicil.

Shep. 410. and this not only of chattels.

Parol revocations allowed in favour of the heir.*

Lord *Hale*, *Hardr.* 376.

That a deviſe of lands does import a *revocation* of a *former* will of lands. If he had been ſatisfied, it was a *ſubſtantive independant* will, he ſhould have held it a *revocation* whether it contained a deviſe of lands or no. Now here it muſt be of lands.

There is no diſtinction between a man's will and the *whole* of his will; and then a ſecond will is expreſsly and by *neceſſity* a revocation of the firſt.

Cro. Eliz. this is no judgment; and the caſe I preſume to have been ended by arbitrament.

In our caſe now before the court—This is not a recent will, it was made at the diſtance of eight years, it is found to contain a different diſpoſition; it makes the whole of his will; and therefore *revokes* the former.

If it revokes not the will but produces an *uncertainty* or obſcurity, if this uncertainty or obſcurity had been in *one apparent inſtrument*, what would have been the conſequence? And what in reaſon ſhould make the difference when upon *two?* One of the common caſes a perſon is *named*, and two or three are of the name and deſcription, they can't take, but the heir; though never meant to take.

No perſon in his conſcience can ſay with *certainty*, Mrs. *Harwood* was entitled.

The caſe upon Sir *Harry Killigrew*'s will I think, as far as we can ſee from the reaſons and arguments, is in *favour* of the heir. The authority of the diſſentient judge, and the importance and difficulty of the queſtion, I hope, will give me your Lordſhip's pardon, for entering ſo largely upon the caſe, and taking up ſo much of yo Lordſhip's time, as, I fear, I muſt.

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* But not ſince the ſtatute I believe and parol revocations in his favour, that had any obſcurity or uncertainty have been diſallowed even before.

[Lord *Manſfield*—We are very glad to hear you.]

Aliud teſtamentum is no more than *aliud* as to the *form*. It do not imply with *certainty aliud* as to the *contents*, I have broug down the caſes upon all the reports.

Perk. 54. *Plow*. 581. 4 *Rep*. 61. ſtated by counſel for t plaintiff, and ſhe had ſaid that the will being in writing the co will *preſume lands*.

Finch replied, that as *animus teſtandi* was neceſſary to *make*, *animus revocandi* was neceſſary to *revoke*.

That revocation was not *vocabulum artis*, ſo as to conclude fro evidence on circumſtances of their conſiſtency; for the ſecond w might be *different* and not of lands, and then even the civilians he it would not have been a revocation. 1 *C*. 291.

The court, I apprehend, held that if the deviſe had been of *lan* it would have been a *revocation*.

The concluding reaſon is, it may be a confirmation.

I ſubmit it cannot be here; if there is the *leaſt difference* as to t property itſelf diſpoſed of to Mrs *Harwood*, the *variation is fata* and it cannot be a matter of *form* merely as alteration of a truſte there was *none* in the firſt; there be no need of any in the ſecon without a total change in the beneficial intereſt.

What can they mean by *different diſpoſitions* upon a general devi but a *general* difference?—Unleſs the following words be ſuppoſe to *reſtrain*, in *what particulars they don't know*; this only mea they don't, who may be object, otherwiſe it would be repugnant

Mr. Serjeant *Hill*, with an apology went into the evidence upo the trial—a ſubſcribing witneſs, to prove that the ſecond will w long and the other ſhort; and that the teſtator almoſt to his dyin moment declared, the defendant ſhould take very little: Then there any thing to make it different from the caſes of two perſo one not meant to take, the other you don't know who, the he ſhall take.

General rules muſt decide upon *property*; and your Lordſhip w not depart from them, unleſs upon particular circumſtances th would do an *injuſtice*. Can you do this by giving it to the he wh who has no body capable of ſaying poſitively, in this caſe that their right is clear againſt him? But a degree of injuſtice muſt be done, and we know not to what extent, by giving the deviſee under the firſt will her *whole* claim; who could never be meant to take *entirely* the ſame under the ſecond, and might be meant not to take at all.

In one of the caſes alluded to—deviſe not *revoked*, though the leaſe and inheritance were to commence at the ſame time; for it was only a revocation *pro tanto*, ſo as to *poſt-pone* the inheritance given by the firſt will, to the leaſe given by the ſecond, and it was apparent it was not meant to revoke the former deviſe, other than *partially*: And therefore the court confirmed the former deviſe, *ſo far* as it was not *altered*; according to the meaning of the teſtator, apparent upon *both* the wills.

Here the will *cannot be*, I ſubmit, of *other lands*, as in *Salkeld*.

No land at all—I have ſubmitted in the beginning of the argument this *cannot* be here.

Lord *Mansfield*—You need not go through the caſes as it went thirty years; the bar will take a note of them; and the court will go through them all.

You are right in ſaying this cannot be a *total confirmation*, or of *no lands at all*; there are ſome arguments in that caſe which do not tally with this.

Mr. Serjeant *Hill* continued—I ſee, next there is an argument upon the *inconvenience* and danger of ſuffering an exiſtent will to be ſworn away; which is the concluding argument. This might have been a very good reaſon at the *time* of the trial, for admitting evidence with great *caution*: But it can be no concluſion againſt evidence upon the verdict; and by the rules of evidence it may be taken as a deed *loſt*, and proved in the *ſame manner*, and there was no demurrer at the time; no point reſerved.

The danger is an argument in *all* caſes, and in order to avoid what was ſuppoſed fraud, the ſtatute reſtrained the evidence that might have been given before; but your Lordſhip will lay no *farther* reſtrictions than was then done; your Lordſhip has obſerved that thoſe reſtrictions have been of leſs ſervice than expected:* Nor need there be the *ſame* evidence as of the atteſtation, one witneſs is certainly ſufficient to prove the atteſtation; and it will always be under the directions of the court, who will take care that no *improper* evidence be admitted.

* V. Wyndham *and* Chetwynd, 4 Bur. vol. 1.

Holt Ch. J. Deviſe of lands in *A.* afterwards *another* will, an deviſe of the *lands* in *D.* That this was a revocation of the lands in but otherwiſe *Finch.* And it was adjourned.

The inconvenience, if ſeveral diſpoſitions ſhould be made, by an whimſical notions or forgetfulneſs, of the *ſame* property, if the la be not a revocation of the firſt, they muſt be all proved.

For the defendant in error Mr. *Davenport*, in reply—*Cro. Eli* 721, was in ejectment *ſtrictly*. In that caſe the teſtator's *intent* w plain, that the eſtate deviſed to his younger ſon ſhould ſtill go to th younger ſon, only letting in a deviſe to his wife, paying a rent to th younger ſon.

Cr. 49. ſhewed an intent that the ſon ſhould have the reverſion.

Deviſe in fee; twelve years after the ſame land left to the ſiſte for fifty years; the indenture delivered to a ſtranger, and not to b given till after his death; and then the ſiſter did not accept, but r fuſed.

A deviſe to *A.* in fee, after to *B.* in fee, in the ſame inſtrumen is not a *revocation*; but they *were joint tenants.* All the judges, b *Walmſley*, held it not a revocation longer than for the term.

Lord *Mansfield*—This is nothing to the caſe; but it is clear wh to a ſtranger, being *inconſiſtent* with the deviſe.

Mr. *Davenport*—It was only to ſhew the court would *look* into a inſtrument, to *ſee* whether it agreed with the former.

The court obſerved, that if in this caſe the ſecond will had be brought before them, and it had been *ſhewn* that there was a demi for five years to Mrs. *Harwood*, it would have ſtood upon *ſtro* grounds.

Serjeant *Hill*—Contents of a latter will unknown will not be revocation of the former, I agree; but if any thing appears of di ference, then it lets in the uncertainty I have objected. They a gued in the court of Common Pleas as if the ſecond will was ſu poſed produced, though certainly not.

The finding ſome difference is no more than your Lordſhip wou have preſumed. How will this conſiſt with what was ſo ſtrong relied on, upon authority of caſes, that your Lordſhip will *preſu nothing*, and muſt not ſee the evidence upon the circumſtances, how ever ſtrong?

Th

That a negative ſound, that the defendant had *not deſtroyed* the will. This is not preciſely ſo; they only ſay they do not find ſhe did, which is as if they had ſaid neither way.

[Lord *Mansfield*—The jury can't find a negative, unleſs ſuch an one as is proved by an affirmative. One may juſtly ſay they have not ſaid a word about it.]

Glazier and *Glazier* is clearly diſtinguiſhed; becauſe your Lordſhip cannot here preſume the deſtruction of the ſecond will.

It is ſaid *revocations* are *not to be preſumed.* It was never contended that they *were*; any more than *diſheriſons* of the heir.

The title of the plaintiff in error, under the *firſt* will, is *not* ſubſiſtent now.

Shepp. 410. tit. *Teſtam.* 17, 18, and *Atk.* may ſhew that before the ſtatute revocations of lands might be by parol.

" It cannot be ſuppoſed the deviſee of the firſt will would *cancel* " the ſecond." Why ſo? Her caſe can't be *better*, it may be *worſe*, by the ſecond. The heirs cannot be *worſe*, it may be *better*. But it has been already admitted, that no preſumptions are to be made, on either ſide.

It is the wiſe doctrine inforced by *Coke*, in his commentaries on *Littleton*, that the learning of the law is complex and linked together;* that by knowing one caſe thoroughly you will be led to the knowledge of many others. And Lord *Somers*, that this principle runs through all the books. And, in truth, the laws cannot otherwiſe be a *ſcience*.

As to *implied* revocations, the ſtatute has made *no* alterations.

Upon the words of the ſtatute, which requires writing ſigned in the preſence of three witneſſes, in the preſence of the teſtator, a writing with the requiſites of the act would be good, as a *revocation* without containing any deviſe of lands.

The writing is *found*; the due atteſtation; and no *cancelling* to be *preſumed*. Therefore the ſtatute of frauds does not alter the caſe at all.

" Preſumptive revocations before the ſtatute are now taken away." They were taken away *before* as much as *now*. The only difference is, that the revocation cannot now be in words, without writing.

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* Scientia legis eſt complexa et concatenata;
Tum demum vere dicimur *ſcire* cum reſpon. *cauſas* invenerimus.

I

I have not deſignedly miſrepreſented any part of the argument.

What my Lord *Cowper* ſaid, in the caſe of *Onions* and *Tryers*, wa in part diſallowed by Lord *Hardwicke*, in ſeveral caſes in *Vez.*

Lord *Mansfield*—We have no queſtion upon it in this caſe. It i not an application to relieve in equity, upon an accidental cancelling.

Serjeant *Hill* continued—We have then *moral* certainty, not mathematical certainty, that the ſecond will did *not agree.* The ſecond is therefore a revocation, or *neceſſary* as *part* of the *title.* I am ſure I have no objection to conſider of a *venire facias de novo.*

Lord *Mansfield*—I have no doubt we can grant a *venire de novo*, if the caſe warranted; but I obſerve you do not pray, as holding the evidence upon the ſpecial verdict ſufficient to defeat the title o the plaintiff in error.

Mr. *Davenport*—I hope the court and Serjeant *Hill* will excuſe me for being ſhort in my reply, as I was in ſetting out. The jury have profeſſed themſelves ignorant of the contents; I conclude you Lordſhip will not go *out* of the verdict, or know any thing of them.

I admitted before that there were three ways of revocation.

Expreſs revocation by the ſtatute.

Inconſiſtence of two wills.

Revocation by act of law.

The will, it muſt be ſuppoſed, the jury concluded to differ; becauſe it was *another*, and therefore not a tranſcript merely.

I only cited *Cro. Eliz.* to ſhew the court muſt *ſee* the contents, to *ſee* the inconſiſtency.

It is then as in *Hitchin* and *Baſſet*, and the caſe of a will is not, as by the civil law, the ſubſtituting another to ſucceed in to the inheritance and rights of the deceaſed; but it is an *appointment of uſes*, which may be created to *ſeveral* perſons; and a revocation of any *one* ſhall not affect the *reſt:* So that a ſecond will not *neceſſarily* implying a *general* alteration, or perhaps any at all, as it may be of eſtates acquired *ſince* the firſt, or if of the ſame eſtates, yet not in prejudice of a former deviſee, *cannot* operate as a *revocation*, till it be ſhewn that *it expreſsly revokes*, or is *inconſiſtent*; and to revoke *entirely* it muſt be inconſiſtent *throughout*. But no *inconſiſtency* is to be preſumed, or can be extended farther than it appears by conjectures on reaſon or probability.

If another will does not diſſent from the former—is the ſixth ground laid down by *Swinburne*.

It ſtood over for a third argument.

Lord *Mansfield*—It will be very proper to look into the hiſtory, and that caſe which has been decided.

I will ſtate ſhortly what principally ſtrikes me at preſent. Though, as to perſonal eſtate, the law of *England* has adopted the *Roman* law, and the conſequences of it, yet in deviſes of lands they differ. A will, in the civil law, is an inſtitution of the heir; in our law it's the appointment of a particular perſon as deviſee to a particular eſtate: And upon that principle, before the ſtatute of wills, when lands were deviſable by cuſtom, a man could not deviſe any which he had not at the time of making his will.

It's upon the ſame principles, but carried too far by ſubtlety, that there have been revocations contrary to the intent; where the teſtator has made a feoffment, or the like, becauſe he has made a new appointment.

With regard to *land*, a ſubſequent deviſe muſt be inconſiſtent with a former deviſe, or the former muſt ſtand, unleſs *expreſsly revoked*; and if it is an appointment to take effect at his death, and no contrary appointment, it *muſt* take effect.

If there be an inconſiſtency in part, this revokes as to *that* part, but no farther. If a man has given an eſtate in fee, and afterwards gives an entailed eſtate, or for years, in the firſt caſe it is a qualification, in the other an expreſs revocation of the former eſtate; becauſe he evidently meant not to give him the *ſame* eſtate as *before*, but a *different* one. What is the queſtion upon this caſe? We are upon a ſpecial verdict; the argument is preſumed. A vaſt deal has been ſaid upon the verdict, and I can't think what was meant by ſtating the nature of Mr. *Lacey*'s eſtate. We are to ſee the concluſions upon the verdict: The heir is entitled by deſcent; there is a will, which, as *A.* ſtood at that period, defeats his title; and then a ſecond will, not known, or the contents: They do not find whether it was *revoked*, or *ſubſiſted* to his death.

On the third argument, for the deviſee, the plaintiff in error, it was argued—By the caſe of *Hitchin* and *Baſſet*, even in the opinion 10 June, 1774.

7 F

nion of Lord *Hale*, a ſubſtantive will, unleſs it relates to lands, or appears to revoke, will *not revoke lands*.

It might affect perſonalty, or realty, or the mode of diſpoſing.

Mere evidence of a ſecond will having been made does not revoke the firſt.

It ſeems the caſe of *Hitchin* and *Baſſet* proves this, and agrees.

Cro. 51.

In wills, (before the ſtatute) therefore, ſolemnly made, the revocation of them muſt be expreſs, or the diſpoſition abſolutely inconſiſtent, or there is no revocation.

The ſtatute requires that no will be revoked by intendment, or conſtruction, or verbal evidence, if not revoked by a ſolemn inſtrument in writing, according to the ſtatute, or by another will.

If it be by a will, the will muſt be another, *altering* and *diſpoſing* of the *ſame* property as the *firſt*, in a *different* perſon.

The diſpoſition, ſurely, was not to the *heir*.

Upon the whole, is there any point, upon the circumſtances, found in the verdict, taken together, which can amount to a revocation.

On the other ſide, for the heir at law, defendant in error—To be a good will, in favour of the deviſee, it muſt be the *laſt* will.

The anceſtor muſt have *continued* in this diſpoſition of his property, ſo *unfavourable* to the heir, to his death.

With reſpect to the firſt will in this caſe, it's plain he did *not continue* in that mind from the making of the firſt will; for he changed his intent, and diſpoſes *differently* by the ſecond. And as a will once made is preſumed to continue till the contrary is found, ſo that the firſt could not have been preſumed not to have continued, had it not been for a finding which ſhews it does not, ſo the *ſecond* will ſhall have the *ſame preſumption* in it's favour; or rather it ſhall *not* be *preſumed againſt* it's exiſtence, and *continuance* to the death of the teſtator; it having been found to have been made, and *nothing* found to the *contrary* of it's exiſtence, *once* ſo proved.

When a ſubſequent will is made, it has been held that it *revoke* the firſt of courſe; and it has been ſtrongly argued, a general ſubſtantive will is a revocation. And of this opinion was Baron *Hale*.

Bu

But this ſeems loſt and overthrown by the deciſion in *Hitchin* and *Baſſet*. And the court muſt find a change of the intent.

In this caſe, as there was but *one general deviſee*, why ſhould the teſtator have made *another* will, if he had not changed the *intent* with reſpect to her?

But it's ſaid the jury don't find this. They find that the diſpoſition is different: To what *perſons* in particular, or in what *proportions* he has given his eſtate, we don't know; but *this* we *know*, that whereas he had formerly made a will, and given *every thing*, within a few pounds, to Mrs. *Harwood*, he has *now* made a *different* diſpoſition.

It is ſaid in *Hitchin* and *Baſſet*, that they held the ſecond will *no* revocation, becauſe it did *not appear* it was of *lands*.

In the caſe now before the court the *atteſtation* proves this.

There it was ſaid, it might concern *other*: He had no other; for as to the 10,000*l.* three witneſſes were *not neceſſary*; he being tenant in tail, remainder in fee to himſelf, might make the money, to be laid out in lands, to paſs as money again.

2 *Peere Williams*, 271. And a man in ſuch circumſtances, I take it, may apply to a court of equity, and obtain, as of courſe, to have the money releaſed, and to diſpoſe of it not as *lands*, but *money*, ſince the *whole* intereſt is in him.

[Lord *Manſfield*—*After* he has made his election.]

Serjeant *Hill*—I think *before* he has made his election it is *land*, to all intents and purpoſes.

Loan of money, where Lord *Hardwicke* determined that the money which ſtood as lands, under ſettlement, with limitation in tail, and a fee, expectant to the ſame perſon, were not liable to the loan, it being a ſimple contract, and the election *not determined*.

Lord *Manſfield*—This was a caſe where the perſon, whoſe repreſentative refuſed to pay, had borrowed the ſum upon the ſecurity of lands, declaring by letter he had money in Chancery to anſwer the debt. And yet they were conſidered as *lands*, notwithſtanding this declaration.

Serjeant *Hill*—If the jury have not found that he deſtroyed the ſecond will, they *preſume* it's exiſtence; they will not find that he deſtroyed it.

And whether the will, if it ſhould appear, and we could kno what it was, agree or diſagree, ſince it does not appear, unleſs M *Harwood* can ſhew it does not diſagree with her claim by the fo mer, which is now an imperfect title without the ſecond, the *he* ſhall take for the *uncertainty*; for he makes no title under a *wi* but takes by act of *law*, unleſs there be a *clear* title *againſt him* And no party ſhall be obliged to ſhew an inſtrument to ſupport h title, except he who claims under it. Now the deviſee, who h no claim but by the *laſt* will of the teſtator, *continued* by him, her favour, to his death, muſt ſhew that a will, afterwards prove to be made, and which, *primâ facie*, cannot be in her favou (eſpecially when ſhe was *general* deviſee of the firſt) did not *defe* or *alter* her title: For unleſs ſhe ſhews *how much* ſhe can take, ſh ſhall take *nothing*. But the heir does not want *any* act of the teſt tor in his favour, but ſhall take, often when there was the *cleare* intention he ſhould *not* take, if that intention is *impoſſible* or *illega* or there is any failure in the execution of it.

The caſe in *Lev.* Tenant in tail deviſing in fee, ſuffers a recover and takes back an eſtate to himſelf in fee, with the *expreſs deſign* effectuating his will; this ſhall *revoke* it, and let the heir in to th eſtate.

It is not at all material whether the heir was named; nor even he was expreſsly diſinherited by the ſecond will, unleſs that will ca take effect; for he muſt take, unleſs ſomebody elſe evidently appea on the will. If one can ſuppoſe another deviſee, but it cannot b told who that deviſee was, the heir ſhall take. Suppoſe the land given in mortmain to a monk, or to a papiſt, the *heir* ſhall take.

Gilbert. "I give *all* to my mother."—This will not take from th heir; becauſe it does not appear *how*, or of *what* eſtate the mothe ſhould take.

Suffer me to repeat, your Lordſhip cannot do an injuſtice by gi ing to the heir, who has a *clear* title, as heir, againſt a doubtful one but if you give to Mrs. *Harwood*, it will be againſt the right of th heir; and it muſt be concluded, in part or the whole, againſt th intention of the teſtator. If he meant to give her the chambers, an the reſt to ſome body elſe, or the contrary, your Lordſhip gives he *all*, to anſwer the intention of giving her a *part*; and perhaps h might mean her *nothing*.

It cannot be a confirmation; for the jury have found it differen

Lord *Manſfield*—The ſubject is exhauſted: It has been extremel well argued, and can admit of no new light.

Th

This is an ejectment brought for chambers in *Lincoln's-inn*, of which *J. Lacy* was ſeiſed in fee. He is alſo found by the ſpecial verdict to have had a reverſion in fee, expectant on an eſtate tail in himſelf of 10,000*l.* remaining to be ſettled, in hands.

April 1748. A will was made, which is found by the verdict to be *now* exiſtent, of all his real and perſonal eſtate to Mrs. *F. Harwood*, on payment of certain legacies. They find another will, *duly* atteſted in 1756, and farther ſay, that the diſpoſition made by the ſaid will of 1756 was *different* from the diſpoſition of 1748, but in what particulars they know not; and *J. Lacy* died in 1767.

They find the title of the leſſor of the plaintiff in ejectment, as niece and heir at law of Mr. *Lacy*.

On this ſpecial verdict each part ſays there is a *clear* title found. The defendant in ejectment ſays for *her*, as *deviſee*, and the other part ſays there is a deviſe *inconſiſtent* or *repugnant*, or at leaſt *uncertain*, on the finding, ſo that the court cannot give judgment; nor have either prayed for a *venire facias de novo*; which this court, as a court of *error*, could have granted.

The court muſt conclude from facts found; they cannot find upon evidence. Preſumption is a ground of evidence: That preſumption cannot now be received, as being evidence, and therefore proper to have been found by the jury, not by us.

The jury have found this for the plaintiff; they have found her *heir at law*. It is rightly ſaid, the heir at law, having a *clear* title, cannot be defeated by a *preſumption*. You cannot *gueſs* him out of his title.

When there is a will, and you don't know to *whom* the teſtator has intended, you can't conjecture he meant to give from the heir. Something, therefore, muſt be found againſt his title, of the ſame *certainty* and *clearneſs with that title itſelf*.

What have the jury found to this title of the *heir*? A *clear* title under the *will*, No *doubtful* expreſſions upon the will: For if the will were not *clearly intelligible* the heir ſhould not loſe his right.

The heir then muſt repel this from facts, ſhewing this will to have been taken away; for the deviſee's *clear* title, like that of the *heir* at law, muſt be taken away by *as clear* an one againſt her. And this title of the *heir*, or *any deviſee*, againſt the firſt will, muſt have *continued* to the death of the teſtator: For it was lately determined, that where a will was made with expreſs words of revocation, and that will and that revocation taken away by the teſtator, by the cancelling of the inſtrument, the former will revives.

What is found in this ſpecial verdict? They ſay a *clear* deviſe of the chambers in *Lincoln's-inn*. In the caſe of *Hitchin* and *Baſſet* the jury ſay they do not find the teſtator deviſed lands by the ſecond will. If the jury had *not* ſaid it, the court would *not* have *preſumed it*. And here, the court would not preſume this different diſpoſition to be of the chambers, if the jury had not ſaid any thing; bu the jury ſay, (*becauſe* they know nothing of the matter, they ſay) that the diſpoſition, &c. was *different*. If he had made a *verba* declaration of the difference, *this* would warrant the finding of the jury, but could make no revocation, had it been ever ſo expreſsly ſaid by him that he *meant* to give her nothing, or *had* given her nothing.

It is a *different* diſpoſition diſtinguiſhes the finding from that of *Hitchins* and *Baſſet*, *aliud teſtamentum*. This muſt have been *another* will, *differing in diſpoſition*, not on *another* piece *of paper*; for *then* it would be the *ſame* will. Neither can another will be a confirmation, for the ſame reaſon; becauſe it muſt have ſome difference, to be another will; and if *no* difference it is not *another* will, but a republication.

A new will, or more properly teſtament, of perſonal eſtate, by the civil law, muſt be a revocation; becauſe it carries with it the making of a new executor; and the making of a new executor gives him the *reſidue*, and puts him in the place of the *heir*. But a deviſe of lands, in our law, declaring the diſpoſition the teſtator means to be made of his property after his death, is an appointment of uſes; therefore muſt be of lands in poſſeſſion. And it conſtitutes no univerſal heir; but there may be ſeveral deviſes, by ſeveral inſtruments, and of ſeveral eſtates, *all* of which may ſtand together. And this diſtinction is as old as *Plowden*.

Vide *Brett* and *Rigden*.

And becauſe a teſtator can only deviſe *ſuch* eſtate as he has, upon this *legal ſubtlety*, if he make *any change* in that eſtate, ſo as to make it *another* eſtate, in *law*, though with a deſign to effectuate his will, this is a *revocation* in law. The ſuffering a recovery by tenant in tail, in order to give effect to his will, and ſo *expreſsly declared* by him, was a revocation, becauſe a change of the eſtate; but there is *no* ground contended of ſuch circumſtances *here*.

There is is *no* revocation then; for I can't ſee any difference between this and the caſe of *Hitchin* and *Baſſet*.

The whole turns upon a *fallacy*, the ground of *uncertainty*. The caſe is, the heir ſhall not be defeated by *any uncertainty*: And when there is an uncertain deviſe to any other perſon, it is void.

But when a will appears certain on the face of it, this is as *clear* a title by *deviſe* as the other by *deſcent*, and muſt be overſet by a *certainty* againſt it. And therefore, I think, in this caſe, the ſpecial verdict has *not* found a *revocation*; nor, conſequently, a *title* in the *heir* againſt the *deviſee*.

Mr. Juſtice *Aſton*—I can add nothing to what has been ſo fully ſaid by his Lordſhip, and am entirely of the ſame opinion.

The two other judges of the ſame opinion.

JUDGMENT of the COMMON PLEAS REVERSED.

Afterwards, on an APPEAL to the HOUSE OF LORDS, JUDGMENT of the KINGS BENCH AFFIRMED.

[*Note*, A worthy friend, to whom I am in many reſpects obliged, has given me a *Note* of *Glazier* and *Glazier*, which is alluded to in the argument, and ſeems to have been a leading caſe in the judgment; and I know not that it is any where reported, and therefore hope it will not be unacceptable here. It was thus; *B. R. Hillary* term, 10 *G.* 3. 1770.

This cauſe came before the court on a motion for a new trial, a verdict having been given for the defendant at *Eaſt-Grimſtead*. In ejectment, and upon argument, it appeared,

That *John Glazier*, having made his will, deviſed lands to his firſt, ſecond, and third ſon, and a pecuniary legacy to his daughter; but the girl ſoon after marrying, the father found it neceſſary to make ſome alteration in his will. He accordingly *ſolemnly revokes* his will by a *ſubſequent* one, which made only this ſimple alteration in the deviſes and legacies; *viz.* a legacy to the huſband of the daughter.

At the old man's death the ſecond will was found *cancelled*. The eldeſt ſon, therefore entered, as heir at law; againſt whom this ejectment was brought, by the advice of counſel, for the lands deviſed by the *firſt* will to the ſecond and third ſons.

Mr. Baron *Smythe*, before whom the cauſe was tried, was of opinion, that the firſt will being *ſolemnly revoked*, it could not *revive* without *republication*, by *cancelling* the ſecond. And accordingly verdict was found for the defendant.

Upon a motion for a new trial, *Dunning*, ſolicitor-general, contended, ſhewing cauſe againſt a new trial, that the law was as ſtated by the learned judge. That to ſet up any *other* rule, would be t open a door to thoſe inconveniences which the ſtatute of fraud meant to guard againſt. That the will muſt be preſumed to b cancelled by the teſtator; and therefore he was fairly taken to b dead *inteſtate*.

Lord *Mansfield*, Chief Juſtice—(without ſuffering the counſel t go on who were on the other ſide, contending for a new trial)— It's *impoſſible* this verdict ſhould *ſtand*. The caſe of wills ſeems t be *exactly* within the *reaſon* of the *rule* relative to acts of parliament If a *repealing* ſtatute be *repealed*; by the repealing *only*, the *firſt* ſtatute is *revived*: So a *revoking* will, by *revoking* or *cancelling*, revive the firſt *revoked* will.

Beſides, if the *cancelled* will could never be given in evidence t *eſtabliſh* ſuch a will, (by reaſon of the *cancellation*) it cannot be produced as a *revocation* of the *firſt* will: So that, that will muſt neceſſarily be ſtanding; and the plaintiff has a right to the deviſes unde that will.

Yates, Juſtice—I am of the ſame opinion: There is a caſe o *Onions* v. *Tryers*, directly in *point*.

Aſton, Juſtice, abſent, as one of the lords commiſſioners in *cancellaria*.

Willes, Juſtice, concurred, *in omnibus*.]

Corporation of Kingſton upon Hull *againſt* Horner.

DECLARATION ſtates the borough of *Kingſton upon Hu* to be a very ancient borough: And that from and befor 1772, to wit, from time whereof the memory of man runneth not t the contrary, the ſaid corporation had been accuſtomed to receive and of right ought to receive, a certain rateable toll, to wi 8 d. for every laſt of lead, and of ſome other articles, according t proportions ſtated in the declaration.

Entry on the corporation books, as far back as *E.* 3.

The

There was a great variety of evidence from the corporation books, &c. relative to the perſon appointed from time to time to receive the toll, and the payment of it.

Lord *Manſfield* left it to the jury, whether they would *preſume* a *charter*, with directions that variance in the rating of the articles would not be an objection to the claim.

The jury ſound for the corporation.

On a motion for a new trial it was objected by Mr. *Dunning*, that upon the evidence the jury ought not to have found for the plaintiff; for that they were not warranted to *preſume* a *charter*, as directed in this caſe; the inſtitution of the corporation having been *within* time of *legal* memory.

2dly, Becauſe the thing preſcribed for was ſubſequent to the exiſtence of the corporation, which was itſelf within time of memory; ſo that there could be no *legal preſcription*.

That as to the caſe where a recovery was preſumed, from a charge in an attorney's bill, it was nothing but evidence of ſurrender of tenant for life, for the purpoſe of making a tenant to the *precipe*. But a record and deed in *pais* are very different.

The caſe of the Earl of *Leiceſter*, I know not what it was.

[Lord *Manſfield*—If it was *Sidney* Earl of *Leiceſter*, they loſt the eſtate, I think, for want of preſuming]

Beſides theſe caſes we were informed of an opinion, to which I ſhall always pay all poſſible reſpect and deference; ſomething which has been ſaid to have dropt from your Lordſhip at *niſi prius*, and other cauſes: Your Lordſhip will inform us of the circumſtances of thoſe caſes, and therefore I ſhall not cite them. I only ſubmit, that, as far as I have been ever able to learn, there have been no ſolemn deciſions againſt us.

[Lord *Manſfield*—I remember, before our laſt *nullum tempus* bill was ever dreamt of, a caſe where *long* poſſeſſion (ſuppoſe an hundred years) ſuppoſing the eſtate could have a *legal* commencement, though it could not operate as a *bar* might be evidence for *preſumption* of title. And in the caſe of *Maidſtone*, ſuppoſing the title could have a good and lawful commencement, poſſeſſion of eighty years might be *preſumptive* evidence; though no title is a *preſcription* againſt the church, any more than againſt the king.]

Mr. *Dunning*—I did not maintain in the *full* extent that a charte cannot be *preſumed*, *antecedent* to the date of *legal* preſcription.

The attention the law pays to the periſhing nature of charters however politic it might be if the law would extend it farther, def cends no lower than 1123, the year of *R.* 1. acceſſion. Till thoſ to whom it belongs ſhall think fit to *reduce* the time, I apprehen the courts of law will not *amend* the law.

The caſes before your Lordſhip might be where the whole fiel of poſſible time was open; but here they muſt preſume a title *ſub ſequent* to the term of preſcription.

A charter of confirmation is produced, which is a thing *now* con ſidered not neceſſary in law, and yet the eſſential original charter to be *preſumed loſt*, without proof that it ever *exiſted*.

At one particular period they uſe in their entry [this I think wa 1681.] the words "and the following rates *added*," then certai rates are *ſpecially* ſtated. They then thought themſelves poſſeſſe of the *legiſlative* authority to add to the *quantum* or encreaſe th the number of theſe tolls. If it ſhall appear to the court they hav not better ground to go on for the tolls they now claim, I ſuppoſ the court will hardly *aid* them in this *ſingular* idea, whatever ma be thought of the other point of preſcription, which by this varianc they ſeem to abandon.

But the corporation received a charter from *Charles* the 2d, whic in *conſideration* of repairs *confirms* the duties with certain exceptions if the corporation had been in poſſeſſion of a claim *without reſtric tions*, would they have accepted one with *ſo many ſuch* reſtrictions.

I conceive that no fiction of law will make merchants tradin liable to theſe duties ſo varied, ſo different from the ſuppoſed autho rity; and that this authority cannot commence by preſumption i modern times.

Lord *Mansfield*—Had you inſpection of all their entries?

Anſwer—We had a certain confined inſpection from the entr 1575, and a little antecedent, and ſome papers relative to their e tries.

Had you any inſpection of entries from 1441, and between th time to 1575?

Mr. *Dunning* in anſwer to this ſaid—There was a book which he thought related to *R*. 2. written in court hand, but in very bad court hand, otherwiſe, he ſaid, he fancied it would not have been very difficult to him.

Lord *Mansfield* ſaid farther, that *great* length of poſſeſſion, though not operating within the ſtatute of limitations, is yet *ſtrong evidence* of a *right* beginning if there can be any.

It is very properly anſwered on your part, ſaid his Lordſhip to Mr. *Dunning*, by obſerving, that not even the borough itſelf is a borough by preſcription.

One ground *ſupports* the verdict, if any proof of it; upon which I have no opinion. The evidence is ſtated of a *port before* 5 *R*. 2. And if a port, and there were any duties, thoſe duties muſt be in conſideration of the port. *Sayrcriffe* was the name, *dudum* of what? Not the river, obſerved Mr. Juſtice *Aſton*, but certainly the port.

Mr. *Dunning* contended—That the *Hull*, formerly called *Sayrcriffe*, meant the river of *Hull*, from whence the town took it's name; and not the port.

Then ſaid Mr. *Dunning*, as to the ſecond ground, the preſumption comes within very narrow limits—A very *ſpecial* kind of preſumption; that there was ſuch a charter between 1382 and 1441, and that *this* charter is *loſt*, and the *others* are *preſerved*.

[Lord *Mansfield*—Are the duties *now* in queſtion of the ſame ſpecies with thoſe granted by any of the charters?]

Note, I underſtand it appeared that as to moſt part they were; but not as to all.

Lord *Mansfield*—ordered to ſtand over till the next day, he being to go to the *Houſe* of *Lords*.

It was further argued accordingly on the 10th of *June*, and Mr. *Wallace* contended, that a charter might *properly* be preſumed in this caſe.

Impropriation preſumed to have been made and the preſumption taken within the reign of *Ed*. 4. Grant of the crown preſumed within the time of legal memory, namely in the reign of *Ed*. 3.

The poſſeſſion appears to have been undiſturbed for three hu dred years; there is *expreſs* evidence almoſt throughout that tin and *implied* evidence as to the reſt, there being *none* to the contrary

Will a *recent* addition of duties by the mayor and aldermen *an hilate* duties, to which they were entitled near three hundred ye before?

He concluded with repreſenting the ruinous ſtate in which t harbour would be, if the court ſhould determine no grant of th duties was *preſumable*.

Lord *Mansfield*—I fancy Lord *Leiceſter*'s caſe was, no recove upon record to be found; upon aſking the jury what they believ of the recovery upon evidence they *preſumed*.

And this was *Grenville*'s caſe, and the recovery *preſumed* in t year 1700.

Mr. *Dunning* ſaid, (as to the Earl of *Leiceſter*'s caſe I believ that the *rolls* were wanting during that year.

Lord *Mansfield*—That makes it a very clear caſe indeed.

[Lord *Mansfield*—You know in the famous caſe of Lord *Purbe* they could not find the exiſtent patent; but the *entry* was admitt as evidence upon an excellent ſpeech of Lord *Nottingham*, thoug entry cannot create the title of viſcount, though it might of bar net.]

King and *Carpenter* was cited of preſumption, where the artic affected by the preſumption was introduced within time of m mory.

Mr. *Wallace* again urged—That if the firſt propoſition laid dow as the foundation of his argument was right, that a grant was *pr ſumable*, it *ought* here to be preſumed; and the jury not to ſit twenty four hours longer without any proſpect of new evidence, to t whether they could find a poſſibility to think otherwiſe. That there ever was a ground of preſumption there was in this caſe.

Mr. *Dunning*, *contra*—that he had nothing to add upon the ca to the propoſition, whether the grant, if it be preſumable, ought be here preſumed.

As to the deplorable diſtreſs of the corporation and their all ſtake, and they fighting *pro aris et focis*, if there was any truth i hi his inſtructions on the part of his client, the other undiſputed tolls were twenty times more valuable, and adequate to the building and repair of the port.

That this was not the firſt caſe of the kind that had been diſputed with this corporation; for that there had been another conteſt upon tolls, only with different plaintiffs a few years ago; and they then put their right upon the charter of *R.* 2.

That it was not impoſſible on time given on either ſide to amend their caſe, that he thought a careful inſpection of the books would produce ſomething material.

It is alſo very extraordinary, that every reign has ſupplied charters down to *Elizabeth*; and yet this charter is unfortunately not to be found.

As to Lord *Leiceſter*'s caſe, Mr. *Dunning* ſaid he underſtood the deciſion had been about an attorney's bill, which gave evidence ſatisfactory in point of fact, if it had been competent in point of law. And upon inſpection the whole rolls, either of that reign or of that year, were found wanting; that this was what had been repreſented to him, though he believed not by any body who had a very accurate knowledge of the caſe, and that, if ever looked into, he thought it would be found ſomewhat like this ſtate of it, whether it were a *niſi prius* caſe, or more ſolemnly determined.

That he hoped, the more antient caſes would be of ſtill leſs importance as applied againſt him.

That the caſe in *Shower*, on a claim of coals imported, turned upon other points.

The firſt objection was, that in a *quo warranto* the crown is concluded upon the mere right; but upon an information not.

Another, as to the competency of the witneſſes, for that on an *hue and cry* the hundred could not be witneſs.*

Nor for pariſh dues, pariſhioners.

Nor legatees of however ſmall ſums, witneſſes upon wills. [It is uſual now to releaſe.]

Another, that a verdict in the caſe of a private perſon was not evidence againſt the crown.

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* Teſtis in cauſâ ſui privatâ non eſt audiendus.

They came to the caſe by compariſon of nuiſances, with preſcri tive rights allowed and recognized by law, and whatever with time of memory has been judicially, or by parliamentary authorit conſidered as a nuiſance, fails of preſcription, which muſt be immemorial continued right uninterrupted, at leaſt not otherwi interrupted than by wrong.* They find that in the time of *Edwa* coals were complained of as a nuiſance; they do not therefore thin there is evidence of an exiſtent preſcriptive right: Nor is there that caſe any attempt to ſupport the claim, by preſumption of grant.

The caſe in *Coke*, I think, will not diſagree with my ideas, o with the cauſe ſhewn for a new trial, when I ſhew what I do admit.

I never meant to ſay, that grants of the crown were *not* preſumable; for the law always founds preſcriptive corporations upon preſumption.

But I only maintained that it was not competent to preſume grant, in a caſe where uſage was not referred, or *referrible*, to a tim *beyond memory*.

The firſt caſe cited on the other ſide Mr. *Dunning* juſt ſpoke to and then proceeded to the ſecond, which he ſaid was of much greater importance. Namely, ſuppoſing the crown when granting th manor was ſeized of the advowſon, whether it ſhould paſs by grant of the manor *cum pertinentiis*—that the court held not, an perhaps upon ſome old ſtatutes.

[Lord *Mansfield*—I ſuppoſe upon the ground that the crown muſ grant by *expreſs* words; for in the caſe of a private perſon it woul be acknowledged good.]

Mr. *Dunning* continued—That neither in this caſe laſt mentioned, nor in the caſe before, was there any thing to confine the preſumption to a time within legal memory.

As to the charter of *R.* 2. that if the court could tranſlate it as granting to a port *then* exiſting, all preſumption would then be unneceſſary and out of the queſtion; the *duties* would follow of courſe, and be incidents neceſſarily carried with the port. But that conſidering the charter he could not, either in grammar or reaſon, think it leſs than a *creation* of the port. The king, ſpeaking to the corporation, declares—*conceſſimus quantum in nobis*; what is the meaning of this *qualifying* clauſe, if the corporation had at that time a port and the duties incident? He added, I imagine it was *then* doubted, whether the king could grant to others to make a port, though he could make one himſelf.

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* Conſuetudo ſemel reprobata non poteſt amplius induci.

And beſides the charter farther ſays "*in meliorationem ejus villæ, quod ipſi et hæredes habeant portum*, is it the phraſe in granting an *exiſtent* thing? *Conceſſimus portum* would have been intelligible; all the reſt is *ſurpluſage*; or *contrary* to the idea maintained againſt us.

I took notice yeſterday, that the *limits* of the port were *deſcribed* by the charter, which would have been of no uſe if this was antient port.

Whether the port was created by the charter or not, *Sayrcreek* [or *Sayrcriffe qu.*] was the name of the *ſtream* which was called *Hull*, at the time of that charter.

If the corporation had the port before, could it have been *annexum villæ* by the inſtrument? But if the crown intended an annexation in *future*; and the reſult of the inſtrument, then the court will ſee the crown had the erecting a port in contemplation, which, when granted, was to be annexed to the town of *Hull*.

Granted, that they were to have a port *ita quod poſſint ædificare domos kaias et ſtaiethas*, theſe are things without which a port *cannot exiſt*—*quays* and *wharſs*; therefore they were to do what was neceſſary to make a port, there not having been one *antecedently*.

They were to this port, and to *what* purpoſes?—*Ad defenſionem augmentationem emendationem et ſalvationem villæ prædictæ*. This was to be to the preſervation and encouragement of the town, by giving them commerce, which till then they had not; and a port, which till then they had not.

They are to do this, which the charter authoriſes them to do, without impeachment from the king and his heirs; theſe words import not ſimply an authority to make a port, to raiſe ſtaithes and quays; but that the works of their own hands ſhould be fully enjoyed by them, without any farther recourſe to the regal prerogative; which would have been *unneceſſary* and very *unuſual*, if he had granted them a port *already known* and defined by certain limits.

Charter of 1 E. 3.—*quod conceſſimus in auxilium villæ noſtra prædictæ paviendæ*, a toll *de rebus venalibus ad eandem venientibus* without any diſtinction between *alien* or *citizen*. The goods are of various ſorts; ſome by land, ſome by ſea; ſome of this country growth, ſome of foreign.

28 *E.* 1. No ſuch word as *port*—no idea anſwering to *importa tion*; no ſuch word as landing, or any word equivalent to any theſe.

It is unaccountable how the word *port* ſhould have eſcaped tho charters if ever thought of, or how not thought of if there was *port before* the time of *R.* 2.

In the charter of *R.* 3. it occurs very frequently when the por by admiſſion on all hands, did exiſt; and it would have occurre before in the antecedent charters, of *E.* 1 & 3. if the thing had the exiſted in the town of *Hull*.

This information convinces me, and will, I truſt, your Lordſhi that there was no charter granting duties antecedent to *R.* 2. becauſ I truſt, it will appear, that the port itſelf did *not* before exiſt; an the difference of the words in what I conceive to be the charte *antecedent* and *ſubſequent* to its exiſtence proves this.

E. 3. *Statutum de prærogativa regis*, if the king grants a mano and the *appurtenances*, the advowſon will not paſs; ſo in this caſ if the king had the duties, which by the caſe before the court h neither had, nor could have in this caſe, they would *not* have paſſ by the grant of the port with its *appurtenances*.

Submitted farther, that the king *could not have the duties, unle by act of parliament*. That in the time of *James* the Firſt, by th arguments of Sir *John Davie*, and *Yelverton*, it appeared, if it we decent to ſay it, where two ſo great men differed, that what ar there called common law duties were *never* in the crown by *comm* law, but aroſe by the ſtatute. And Lord *Vaughan* ſays, he wonde how ſo great a man as Sir *John Davie* could doubt. Lord *Hard wicke* cited this caſe. Vide *Vez*.

12 *Co.* 34. Caſe of cuſtoms, ſubſidies, and impoſitions, Lord *Co* refers to the ſtatute 34 *E.* 1. *de tallagio non concedendo*, to *magn charta*, and to divers ſtatutes and precedents in the books, expreſſ againſt new impoſitions by the crown. And by the ſtatute 7 *R.* 2. juſt after the charter now in queſtion, *magna charta*, and th other charters of the liberties of the people, were confirmed.

There are many inſtances, in which the power of the crown now underſtood reſtrained, in which in before was not ſo underſtoo There were in ſeveral borough towns *preſcriptions* contrary to th *natur* *natural** and *civil* rights of ſubjects, and *detrimental* to *trade.* Theſe are *not maintainable now*, nor were three hundred years ago: There muſt be a ſtrict preſcription to ſupport them.

It has been ſaid (and if this had been a caſe where the crown might have had the duties in conſideration of repairs, it might have been applied to this if to any caſe). It has been ſaid, as your Lordſhip's opinion, that if there was a ſtrict *legal* preſcription, even an act of parliament ſhould be *preſumed:* But this would not be a caſe of ſuch preſumption; nor a caſe in which, I apprehend, the crown could have granted duties. The crown has the *opening* and *ſhutting* of the *ports* for the *defence* of this kingdom; but *not* to make *gain* of them: The one is *protection*, the other *expilation.*

It was very natural in the time of *James* the Second they ſhould apply, at that *nice* juncture, for new duties to be granted; when they might foreſee their uſurped duties were in probable danger of falling.

It was ſtated, that King *Richard* had the *port* and *duties* in *fee:* I inſiſt that he *never* had the duties *at all.* If he had, they muſt have been granted to the corporation, under the term *profits* or *cuſtoms*, or ſomething implying a burthen to the ſubject and benefit to the corporation.

I ſubmit, as to the claim of duties, under this ſuppoſed preſcription, that it was founded in uſurpation, and could have no *legal commencement* in the time of *R.* 2. unleſs by *ſtrict preſcription*, *or rights plainly* incidental; neither of which, I contend, have place here.

Lord *Mansfield*—You go upon a ground which quite overthrows one of the points: For if this claim could never have a good *commencement* there could be no *preſcription.*

Argument continued.

Vaughan, 158. [*qu.*]

2d *Vez.* 621. Corporation of *Exeter.* My Lord *Hardwicke* ſays, "It has been doubted, whether the crown can have theſe duties, "other than by an act of parliament *preſumed* to be loſt." And that was the argument between Sir *John Davie* and *Yelverton.* If, then, the crown muſt have it by act of parliament, which muſt be *within time of memory*, how can a corporation or private perſon claim it by *preſcription?*

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* There are natural rights, againſt which there cannot even be a preſcription.

Mr. *Wilſon*—That it was hardly poſſible to add any thing to wh had been ſaid: And therefore that he ſhould only make an obſerv tion or two.

That preſumption of a grant cannot be but where there is roo for preſcription, nor preſcription within time of memory, he argue from 10 *Co.* 88. treſpaſs. Juſtification under letters patent. Th court would not admit the juſtification for failure of production of t letters patent; and there the danger is ſhewn of *preſuming* a dee when it might, for ought that appears, ſome way or other be app rent, if it ever exiſted; becauſe if ſhewn in evidence *interlineatio* *eraſures*, or the like, might appear; or *conditions* or *limitations* the deed: And it would be *ſubverſive* of the *true reaſon* of the *com mon law* to let in ſuch evidence of a deed. And that was a determ nation in which Lord *Coke* himſelf deſires the reader to obſerve, th *all* the *judges* of *England concurred*.

Beſides, the corporation have referred to their *own* ordinance which they would not have done if they had known of a grant i titling them.

Court—It is not an *ordinance*, but a *liſt preſcribed* and *ſet dow* I don't, however, object to this obſervation; becauſe they *ought* refer to the *original* grant rather than to *inferior* evidence.

Argued farther by Mr. *Wilſon*—That their petition to *Cromw* proved they had *then* no ſuch right: And if ſo, *all antecedent* e dence muſt be out of the caſe.

That the corporation would not be conſidered in the light o private perſon, who, by accident happening in the family, migh naturally loſe the evidence of their title, without the loſs being matter of *public notoriety*, or even known amongſt themſelves, in courſe of years after it has happened. That this was not the ca of the corporation of *Hull*; and that in fact if they loſt, as appeare *none* of their other grants, how is it that they have loſt this *onl* And ſtill more, how can it be taken for granted, and with nothi but conjecture, that it ever exiſted? and that defeated by very ſtro preſumption to the contrary.

[Lord *Mansfield*—The ground upon which this application been made for a new trial (and which has been very *ably* ſupporte is this—that there was no title made out by the plaintiff, for t port duties, which ought to have been left to the jury: And if a part of what was left to the jury was not proper, to be ſure a n *trial* ought to be granted.

1ſt. That there was a port exiſtent *before* the time of *R.* 2. with *the ſame* duties; and to prove this they allege, that if there was *antecedently* ſuch a port in the crown, the duties might certainly be granted, and by evidence of *uſage* muſt be *preſumed* to have been granted from time *immemorial.*

If this be true, there is an end of the new trial; the jury had that left them which was proper to be left.

2d. Suppoſing it to be clear that there was *no* port *before* the time of *R.* 2. and then an erection of a port *without* duties; it is contended, that the claim of the plaintiff's may be ſupported by *preſumption* of a *grant* of duties *between* 1382 and 1441.

I meant to ſay when I began the *ſingle* ground left to the jury was, whether upon the evidence they would preſume ſuch a grant between 1382 and 1441. If it had come out that there was no inſpection before I ſhould have ordered a *new trial* for *farther* light. On *bare* allegation where there has been an inſpection, and you have not ſince the term deſired to ſee the deeds, the court cannot take it up on a ſurmiſe of ſpoliation, they can only take it upon the judges report.

Now as to the charter of *R.* 2. From the year 1441, to the time when the queſtion aroſe, there is very *ſtrong* evidence (including a prodigious period of three hundred and fifty or ſixty years) of theſe duties taken without *ſuit* or *diſturbance.*

An hundred years ago 13 *Car.* 2. they apply ſtating they have a right *immemorial* which *Charles* confirms.

Another 4 *J.* 2.

It is ſaid—"This charter relates to duties, and they lay their "claim by *immemorial uſage* and *not* by charter." I am well aware why Mr. *Wallace* waived inſiſting upon the charter; becauſe the grant founded upon ſuch charter of *R.* 2. muſt have been within time of memory. But if the *poſſeſſion* of the crown, and the *title* of the crown, be taken as the ſource of the grant; then it will be as a preſcriptive right in the crown to theſe duties, and from thence derived to the corporation as claiming under that preſcription.

As to the obſervation, that the difference of the claim was the ground, this makes no difference; they reſt their title upon a preſcription however they make it out.

Then we come to the *charter:* And it is ſo far from clear, t this was a creation of the port by the charter, that, if left to upon reading the charter, I ſhould conceive the port exiſted *befor*

The *water* and the port are ſynonymous.

The port of *London*, the port of *Harwich*, go miles into the ſe

What is called *Sayrcreek*? The port: You cannot put anoth conſtruction upon *Sayrcreek*, but as the name of the *port*. It co not be called *Sayrcreek*, meaning the town, in the 27 E. 1. wh the name is *Hull*, and the town called *villæ de Kingſton ſupra Hu* and yet it ſays, *dudum vocat' Sayrcreek*, that it was called *Sayrcre* a *great while before*, which the *town* was plainly not for the reaſ juſt given; but the *port* might. And the very name of cre implies ſomething in the nature of a *port*, at leaſt it does not imp a *town*. What *ſort* of port, what *trade* or *merchandize*, what *qu* and ſtaithes, is *another* queſtion: Probably few, and of very lit conſequence.

Annexum villæ they had the port before, but now *habeant port* *in perpetuum annexum villæ*.

Other words *ſupport* the conſtruction rather than the contrar They ſhall have the port "without the interruption of our offic "and miniſters," which was very important if the port exiſted *b* *fore*, and the king's officers had been accuſtomed to collect for t crown: But if the port had been then erected, it would have be underſtood that giving it to the corporation in *perpetuum*, wou have been giving all that could paſs by ſuch a grant, ſeverally a excluſively.

But there are *other* arguments, and ſome of them not witho weight and force, to prove that the port did *not* exiſt *before*. The are arguments therefore of ſome conſideration on both ſides, to pro that it *did* exiſt *before*, and on the other hand that it *did not*. At lea then it is *doubtful*; and if *doubtful*, what more proper to be left the jury.

What evidence have they given? Above three hundred and fif years uſage, the *ſtrongeſt* evidence poſſible.

Another queſtion was made, whether the grant could have a *l* *gal* commencement.*

If the queſtion were whether ſuch charter would ſupport th claim as a grant in *conſideration* to *repair*, *I would take time to conſide*

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* Quod non habet initium non petitur finem.

It ſeems to be taken in the common pleas by all the judges;* and Lord *Hale* was cited *de jure regio*, *ports* are like *markets*; and the king may *create* ports and make a *new* grant of them; and authority cited of a grant 21 *E.* 1. to the Counteſs of *Devonſhire*.—But *without this* there is enough left with regard to the granting or refuſing of a *new trial*.

All evidence is according to the ſubject matter to which it is applied. There is a *great difference* between length of time which operates as a *bar*, and length of time which goes in *preſumptive* evidence of a right, ſtill liable to be overthrown by *contrary* evidence, and not *concluſive*.

V. the S. P. reſolved in C. B. caſe of Tyſſen and Clarke ſupra.

If length of time is pleaded in *bar* upon the ſtatute of *limitations*, the jury is *bound* by the *bar*; though they and the court are *convinced* in their conſciences, the money was never paid.

The date of preſcription is fixed (and was firſt fixed five centuries ago) from the acceſſion of *R.* 1. but this will be ſufficiently proved by the evidence of no perſon living, nor any written evidence running to the contrary: But any written evidence will go againſt this *preſumptive* and *implied preſcription*; but the *poſitive ſtrict and ſettled legal preſcription* will operate *effectually* in *bar*, be the *title* or the *evidence* which way it will.

Difference between poſitive preſcription, and evidence of a preſumptive preſcription.

Length of time with *circumſtances* has no *poſitive rule*. Length of time is no *bar* in an action upon a *bond*; a *great number* of years without any intereſt paid upon the bond, may be a preſumption that the bond was diſcharged by antecedent payment: But if the jury ſee on evidence that the man was not able to pay, or that he acknowledged the obligation within a recent time, the preſumption is taken off.

No poſitive rule what length of time ſhall operate as a preſumptive preſcription. Vide Rex v. Stephens M. 31 G. 2. Bur. 343—4.

A charter loſt may certainly be *preſumed*: *I don't know that exiſtent thing which may not be ſupplied by evidence.*

A record (*if* you can *ſhew* it *ever* exiſted) and *has* been *loſt*, you may *ſupply it*.

Preſumption, when the exiſtence of a

thing is proved, and the thing loſt; preſumption where the antecedent exiſtence of a thing is proved implicatively, by the exiſtence of ſomething which could not have exiſted without it. Note, this is one of the ways of proving the higheſt, moſt important and cleareſt of all poſſible truths.

Suppoſe you cannot ſhew it *ever* exiſted; yet enjoyment upon a *title*, which *could not beunleſs by the record*, is evidence of the exiſtence of ſuch a record, to let the party claiming into the benefit of it as if it had *actually* been *produced*.

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* Qu. the caſe and time to which his Lordſhip refers.

In Lord *Purbeck*'s caſe there was *no* proof of *loſs* of *record*. H ſat in *parliament* as *viſcount*, levied a *fine* of his honour as *viſcoun* and *enjoyed* the *title* to his death as *viſcount*. But there was no *actu* proof upon *record* of his peerage. It happened the argument wa made *unneceſſary*; for the patent was found: Yet *that* was *only preſump tive evidence*, for the letters patent might have been *never executed* and there are caſes, within my memory, of patents *granted* and *n made out*, which did *not bind* the king.*

It would be *very pernicious* (eſpecially before the *late act* † whe *no time* was a preſcription againſt the crown) that *no preſumpti evidence* ſhould be admitted in ſupport of the title of a *ſubject*.

† called Κατ' 'αντιφρασιν the nullum tempus act; it appears to be one of the inſtances in the preſent reign, where the crown has been pleaſed voluntarily make a beneficial reduction of its prerogative.

There is a caſe of *great authority* in Lord *Coke*, determined by th chancellor, who called the judges to his aſſiſtance; and there is n a poſſibility in that caſe of the preſcription having been before tim of memory.

Beadle *againſt* Read and others, Hil. 4 Ja.

Grant of the manor of *Kimbolton*, *anno* 31 *E.* 1. The king w ſeiſed of the ſaid manor, to which the advowſon of the church *Kimbolton* was appendant, and granted the manor, with the appu tenances, to *H. de Bohune*, earl of *Hereford*, in *tail general*. Th the grant did not paſs, for the reaſons there given, an impropriatio is made, as under this grant, which muſt have been within time memory; and reſolved by Lord *Elleſmere*, and all the judges, th the plaintiff ſhall enjoy the ſaid rectory, for though, by an thing which can now be ſhewn, the impropriation is *defective*,* f that the iſſue had nothing in the advowſon to paſs to impropriee the time of his grant, yet that a lawful grant ſhall be intended f the ancient and continual poſſeſſion; and that all ſhould be *preſum* to make the ancient impropriation good, on account of the wa occaſioned by time, whereby records, letters patent, and other w tings, are conſumed or loſt. And it is obſerved in that caſe, th ancient poſſeſſion would hurt inſtead of ſerving, if after the death the parties, and a ſucceſſion of ages, any objection or excepti ſhould prevail; which, if made in the life-time of the parties, mig have been anſwered, but at ſuch a diſtance not.

* The advowſon not paſſing by the words cum pertinentibus.

There is a caſe from the duchy of *Lancaſter*, (I don't recolle the circumſtances) where I left it to the jury, whether they ſhou not preſume there was a grant from the crown. I *then* thought was a *principle* in law, that upon circumſtances you may leave to t jury (and the caſe cited is an authority) to conſider whether they will *preſume* a grant; and they will conſider upon the circumſtances, or a court of equity, if it properly comes before them; but here, on ſo *narrow* a compaſs as fifty-nine years,† whether upon circumſtances they ſhould preſume, would have been very proper to be conſidered by the jury.

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* There is a very recent and melancholy inſtance, of a patent granted and executed, within every ones memory.

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Poſſeſſion is very *ſtrong*; *rather more* than *nine points* of the *law*. Very great ſtrides have been made in favour of it: Some which Serjeant *Draper* has mentioned, of the preſumption of a bye-law, invented to ſupport uſage which would not have been good without it.

To be ſure, it was a *great ſtride*, when *firſt* introduced, to ſuppoſe there was immemorial cuſtom that copyhold lands ſhould be entailed, though, certainly, there was no ſuch cuſtom earlier than the ſtatute of *E.* 1. but this was done in favour of *poſſeſſion*: And it ſeems *very dangerous* to the *ſubject*, that there ſhould be *no preſumption* againſt the claim either of the *crown* or of the *church*, be the circumſtances what they may.

Namely, by 2d Weſt. de donis an. 13 E. 1. A. D. 1281.

Upon *both* grounds, I think, it might be *properly* left to the jury. But I *ground* it *principally* upon the firſt, that there was an *old port*, formerly called *Sayrcreek*, with duties thereto belonging, before the time of *R.* 2. time out of memory.

But even was it *more* doubtful, I ſhould be very *unwilling* to *diſturb* a *verdict*, upon poſſeſſion of 350 years. It is not *concluſive evidence*, and I don't think it's much to grant them the benefit of a verdict, ſubject to obſervations upon circumſtances which hereafter may come out, and probably be in farther ſupport of their title.

CURIA OMNIBUS ASSENSIT: Whereupon RULE to ſhew cauſe why a NEW TRIAL ſhould not be granted, in the above caſe, DISCHARGED.

[*Priddle* and *Nappiers*, 11 *Rep.* 8 *Mic.* 10 *Jac.* In attachment upon prohibition in the Common Pleas, the plaintiff declares againſt the defendant proprietor of the rectory of *Tittenhul*, in *Somerſet*; and makes title from *Robert Sherburne*, and his predeceſſors in the priory of St. *Peter* and *Paul* in the ſaid county, as rectors of *Tittenhul* aforeſaid; for that the ſaid *Robert* and all his predeceſſors in the ſaid priory being ſeiſed, and in poſſeſſion of the ſaid rectory and of *twenty-two acres of land*, as parcel and appurtenant to the ſame, in right of his ſaid priory, on the 20th of *March* 1530, the ſaid prior with his convent did give grant and *ſurrender* the ſaid priory, the ſaid rectory, *&c.* and the *ſaid twenty-two acres* of land to King *H.* 8. his *heirs* and *ſucceſſors*. And that by force thereof, and of the ſtatute of diſſolutions 31 *H.* 8. King *H.* 8. was ſeiſed of the

ſaid rectory in his demeſne, *&c.* as in right of his crown *diſchar*
of payment of tithes, and being ſo ſeiſed, conveyed the inheritanc
the ſaid twenty-two acres to Sir *Thomas Freke* and others; who *a*
38 of *Eliz.* demiſed to the plaintiff for ninety-nine years, if th
of his ſons or any of them ſhould ſo long live; and averred th
lives, and that the defendant proprietor of the ſaid rectory, ſued
plaintiff for *tithes* of corn growing on the *ſaid twenty-two acres.*

And defendant, *Napper*, alledged a grant, by letters patent
Queen *Elizabeth*, *anno regni* 2d of the ſaid rectory, to *Rive* a
Evelyn, and their heirs, and by *meſne* conveyances to himſelf,
defendant in fee: Whereupon he libelled for the ſaid tithes, as
lawfully might, with an *abſque hoc*, that the ſaid *Robert*, late pri
or his predeceſſors, *from time whereof memory runneth not*, *&c* he
the *ſaid twenty-two acres*, diſcharged of tithes. On iſſue joined
jury found a *ſpecial verdict*, in ſubſtance thus: That the prior a
his predeceſſors, from time whereof, *&c.* to the diſſolution, &
were ſeiſed of the *ſaid twenty-two acres* in their demeſne, as of f
in right of their ſaid priory and that one *Thomas* was ſeiſed of
advowſon of the ſaid church of *Tittenhull*, *jure prioratus.* And
being ſo ſeiſed, *H.* 8. in the twentieth of his reign, by letters p
tent of his *ſpecial favour*, *certain knowledge*, *and mere motion*, grant
licence to the ſaid *Thomas*, then prior, and the convent and
and their ſucceſſors, to impropriate, conſolidate, incorporate, ann
and unite the ſaid church of *Tittenhull*, and the ſame ſo improp
ate, *&c.* to hold to their uſe, *&c.* charged with proviſo to endow
vicarage, and a competent annual allowance for the poor. And th
John, biſhop of *Bath* and *Wells*, 4 *September* 1529, by indentu
tripartite, inform as ſet forth by the verdict, did annex, approp
ate, and unite the ſaid church to the ſaid priory, with the aſſent
the dean and chapter, party to the indenture. And afterwards t
parſon of the ſaid rectory died, and *Thomas*, the ſaid prior, entere
and was well ſeiſed of the ſaid rectory, and of the ſaid twenty-tw
acres in his demeſne, *&c. jure*, *&c.* and afterwards the ſaid pri
Thomas died, and prior *Robert* ſucceeded him. And after the ſa
appropriation ever held and had the ſaid rectory, with the ſa
twenty-two acres in right, *&c.* and found the ſurrender. And th
the ſaid King *H.* by deed of indenture, as ſtated in the verdict,
July, *anno* 36 *regni*, demiſed the ſaid rectory to *W. P.* doctor
law, for twenty-one years, who aſſigned to *Edward Napper*, a
that no tithes were paid till the ſaid *Napper* had a ſentence in t
court of audience, *anno* 2 *Mar. reg.* againſt one *Thomas Gull*, th
farmer of the ſaid twenty-two acres; and after the ſaid ſentence
the eighth of Queen *Elizabeth*, tithes were paid—and convey
ſaid rectory to Queen *Elizabeth* And by the ſaid letters patent a
divers meſne conveyance to *Napper* to the defendant, and conclu
in the uſual way, praying the judgment of the court on the premi
ſes, whether the plaintiff or defendant have a better right.

Reſolve

Reſolved, *inter alia*, that the information upon which the prohibition was granted was ſufficient in matter; for although every pariſh church is ſuppoſed preſentative, and the incumbent ought to come in by admiſſion, inſtitution, and induction, yet the plaintiff, in this caſe, may *preſcribe* that the prior and his predeceſſors, *&c.* from time whereof memory, *&c.* have been rectors; for that amounts that it was impropriate: *And the beginning of a thing before time of memory can't be known* whether it came by union or impropriation. And therewith agrees 21 *E.* 4. 65.

And ſecond, it was reſolved, that an appropriation defective at common law, yet if the rectory was in *reputation*, appropriate, and *ſo* uſed, would paſs to the king under the ſtatute of 27 *H. c.* 38. or 31 *H. c.* 13. even though the ſtatute of 35 *Eliz. c.* 3. could not aid it. And then the caſe of *Kimbolton* is cited, and 19 *Eliz. Dyer*, 368, where an appropriation under a grant of an advowſon by a perſon only tenant in tail at the time of the grant, *videlicet*, 13 *R.* 2. was reſolved by Lord Chancellor *Bromley*, with the Maſter of the Rolls, and Juſtices *Shute* and *Wyndham*, to be good. And note, there the preſumption had it's commencement thirteen years lower than here, in the principal caſe of the corporation of *Kingſton*, and inſtead of 350, could have been but of 183 years continuance. And vide *Crimes* and *Smyth*, 12 *Co.* 30 *Eliz.* where the original grant had been on condition to endow a vicarage. Alledged the condition had never been performed; the court preſumed the performance on the maxim, *ex diuturnitate temporis omnia præſumuntur ſolemniter eſſe acta.* And note there was but 107 years.]

Croſſer *againſt* Miles.

ON a motion to ſtay proceedings on payment of debt and coſts.

Affidavit that defendant paid the debt and coſts to a perſon who called himſelf the plaintiff's clerk, whom he underſtood *authorized* to receive the ſame, for the uſe of the plaintiff's attorney, in conſequence of a letter which the ſaid perſon brought from the plaintiff, with an *account* of the debt and coſts, and deſiring that defendant would pay the ſame: And that the ſaid perſon accordingly gave a *receipt* for the plaintiff; notwithſtanding which payment the action has proceeded.

Againſt the rule—The meſſenger ſent is *not* ſtated to have *intimated* at all that he had *any* authority to *receive* the money. In fact, he was a man merely employed to *carry errands*, but, by his very appearance, ſo poor as not likely to be truſted by any one as a pr per perſon to receive money. And that the plaintiff intended on by ſending him to give notice that he expected the defendant to p in convenient time, either to himſelf or ſome proper perſon, but no means to this errand-man. And that he *never* truſted him wi more than *five ſhillings* at a time.

For the rule—That the money was in *due courſe*, and, accordi to the *practice of law*, *paid* to the *clerk* (for ſuch he affirmed him ſelf to be) of the plaintiff. And that the plaintiff's attorney had far acknowledged him to be his clerk as to call him a hackney *writer*, employed by him in doing buſineſs.

Lord *Mansfield*—Don't you *foiſt* in a prepoſition which is *not* a lowed; that is, that the perſon was his *clerk*. If this was a perſo *uſually entruſted* to *receive* money: But the perſon who ſends ſwea that he *never* entruſted him with more than *five ſhillings*.

Mr. Juſtice *Aſhhurſt*—That it might be the ground of an actio if they could prove before a jury that he was a perſon *uſually* employed to receive money.

The counſel, upon this, moved that the rule might ſtand till ſuc matter was proceeded on, if any ground was found to proceed.

Lord *Mansfield*—This will not be allowed upon *motion merel* without evidence that this perſon was *uſually* employed to receiv money. If either party ſuffers, on a miſtake, they ſuffer *hardly* The one, if this *be* taken as an *authority*, for *giving* it imprudently the other, if it be *not*, for *paying*.

The *maſter* ſays it is *far* from a *general practice* to pay debt an coſts to the *clerks*. They don't *uſually* do it for a ſum of *any conſequence*.

Rule discharged.

Knotting *againſt* Miles.

On a motion to ſtay proceedings in ejectment till a *ſufficient* perſon be appointed, who ſhall undertake for coſts, the *leſſor* o the *plaintiff* being an *infant*.

On the other ſide, it was contended, that the *rule*, inſtead o being made *abſolute*, ought to be *diſcharged* with coſts: For tha where there was a *real plaintiff* in ejectment, *no ſuch* application wa *ever* made. Now here there is a *real* plaintiff, who appears to b

huſban

huſband to the mother of the infant. The huſband declares he is *able*, and will *undertake* to *pay* the *coſts*.

On the other ſide—That this was an ejectment to turn the mortgagee out of poſſeſſion, *without* payment of his principal and intereſt: That, at all events, the rule ought to be made abſolute; becauſe they might know that the plaintiff was indeed an *exiſtent* perſon, and not *ideal*, as *John Doe*, or *Richard Roe*; but that it did not follow that he was at all more reſponſible.

Lord *Mansfield*—There is *no ground:* Here is a *real* plaintiff, and the rule was obtained upon a *falſe ſuggeſtion*.

Let it be DISCHARGED WITH COSTS.

New Trial.

Floyer *againſt* Edwards.

ON a motion for a new trial, upon a ſpecial verdict.

Sale of gold and ſilver wire to the defendant by the plaintiff, who was a dealer in that buſineſs, and three months credit, the uſual credit in the courſe of that trade, and with an encreaſed price, *if* not paid within the time, amounting to more than the rate of five *per cent.* but not more than the ordinary rate in that way of buſineſs, upon non-payment at the time ſtipulated. The goods were not paid for at the time; and, upon theſe facts found, the queſtion was, whether the contract was uſurious, and therefore void.

Argued, that the credit being to ſtand enlarged as long as the money ſhould be unpaid beyond the three months, the tranſaction could appear no other than a *colourable* contrivance to lend money on *uſurious* terms.

Agreement upon an *illegal* contract is entirely *void*; and not only ſo, but *uſury* by the ſtatute.

Moore, 397, if one comes to borrow money, and the other ſays he will not *lend*, but he will *ſell* corn, or the like, with an advance of more than ten ſhillings the hundred, which was then legal intereſt,* this is uſury.

Reynolds *v.* Clayton.

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*There was no intereſt then that was legal; but intereſt above ten per cent. ſubjected to the penalty; intereſt under was liable to be forfeited.

Lord *Mansfield*—The caſe which you argued very well, (*Mac* and *Lovell*) about two years ago, was only from what time the ac tion accrued, and agrees not with this. Can you make any argu ment in this caſe to ſhew the agreement is good, but there is uſur beyond?

Anſwer—No, my lord: If the agreement is good, I cannot eſta bliſh my point.

Againſt the rule—The *lender* of the money might fix a price fo three mouths credit; and if he was to give a *doubtful* credit *beyon* might contract to receive an *advanced* price.

This is not an agreement for an *uſurious* purpoſe.

It is a commiſſion for *bonâ fide* ſale of goods; it is not a *preten* to cover a loan, upon *uſurious* terms; for I admit the caſe cited b Mr. *Buller* to be good law, that being merely an *evaſion*.

Here the contract gives the party an *option* to *pay* the mone without *any encreaſed* uſe.

How many leaſes has your Lordſhip ſeen, *nomine pœnæ*, of twent ſhillings or five pounds for every days holding over and keeping bac rent longer than the time.

The nature of uſury is ſuch, that it muſt be a *certain* compenſa tion *ſtipulated* at the time, and which, by the agreement, *muſt b paid* by the borrower, *at all events exceeding* the legal allowance not a contingent encreaſe, from which the borrower may diſcharg himſelf by *payment at the day*.

Burton's caſe, 5 Rep. [69 *Mic.* 33 & 34 *Eliz. B. R.*] The cour it being in the election of the grantor to have *paid*, and *fruſtrat* the rent, this is not *uſury*; [vide alſo *Clayton*'s caſe, the next in th book] but if it had been agreed, *notwithſtanding* power of *redem tion*, the money ſhould not be paid at the day, this had been *uſur* For this had been an *evaſion*. And no colour ſhall *defeat* the *reme* of the ſtatute; for the ſtatute gives him an *averment*.

Cro. Ja. 509. *Roberts* v. *Tremaine*. A caſe put by Mr. Juſtice *Do dridge*. If I ſecure both intereſt and principal, and it be at the elec tion of the party to pay within the time, and ſo avoid paying th *encreaſed* intereſt, *this is not uſury*. *Hawkins*'s Pleas of the Crow 247.

Cumberbach, that where the party has his *election* to pay within the time, but on failure he muſt pay ſuch a ſum, this is *not uſury*, but *nomine pœnæ*. I admit this to be a *dictum*, but it is a *dictum* of Lord *Hale*'s.

In this caſe the ſeller might have had his *action* at the end of three months, and have *compelled* payment; the buyer, at the end of three months, might have *tendered* the money, and inſiſted on it's being accepted as payment, without being liable to the encreaſed ſum.

Mr. *Bearcroft*—That it was *rightly ſaid uſury* was a crime, and not to be preſumed. Have the jury found it? If the *ſubſtance* had been *uſury*, and the *form* a *contract* for ſale, *no colour*, *no* contrivance, *no ſhift*, to uſe the words of the ſtatute, ſhall ſerve.

All the trade in the kingdom is carried on by this kind of credit.

On the other ſide, in reply, Mr. *Dunning*—I had argued this was the caſe of *all* the trades on *credit* in this kingdom, *becauſe* if this *particular* trade might do this, the *reſt might*. I did not expect to be contradicted; for I knew it was impoſſible, upon facts: But I did not expect ſo candid a conceſſion; from whence it will follow if *this* trade has done *right*, which *hitherto* has *alone* uſed this, and not without the exception of a perſon who ſaid he thought the laws would not ſuffer him, and therefore did it not, *all* the other trades will do the ſame.

If the jury have not found what, upon evidence of facts, they *ſhould* have found, this is a *ground* for a *new trial*.

This does not agree with the caſes *nomine pœnæ*, becauſe the recompence was certain.

The caſe in *Cro. Ja.* ſuppoſing the agreement lawful, is to ſecure *punctual payment*, with a *groſs* ſum of 30*l.* as penalty, which will be the *ſame* whether the withholding be a month, a day, or a year.

But here is a ſum *accumulated* in *proportion* to the *time* of withholding, and which accumulation *is far beyond* the *proportion* of *legal intereſt*.

That a *penalty* is a very different thing: For in the caſe of a penalty upon bond courts of law *now relieve* upon the ſtatute, and courts of equity *always*.

They

They did not mean by the *original* contract the payment ſhoul be *regular*: Why ſhould they, when the ſeller could never get ſ much by payment at the day? And if the buyer had been likely t pay at the day, he would not have been entangled in ſuch a con tract. It may be ſaid he might have paid at the day, but he ha not money ſo *plenty*: The wiſdom of theſe laws is the protectio they afford to *indigent* men.

That an encouragement of uſury tends to the encouragement o trade is quite a *new* propoſition.

The court can draw no line; for ſixty *per cent.* may as well b taken as ſix: And then too all the arguments might be uſed whic are *now* uſed of the *poſſibility* of *payment* at the day.

The queſtion ſeems very ſhort, whether there be *any* law again uſury? whether it be founded in policy? and whether it be *wiſe* o *proper* in the court to *repeal* it?

V. 37 H. 8. c. 9. 13 Eliz. c. 3. 12 Car. 2. c. 13. 12 Ann. ſt. 2. c. 16.

Lord *Mansfield*—The ſtatute againſt uſury prohibits any man fro taking, *directly* or *indirectly*, on the loan of money, goods, or mer chandize, for the *forbearance* of *payment* of intereſt above five *pe cent.* by the year; and ſo in proportion for a greater or leſs ſum, an a longer or ſhorter time, all bonds, contracts and aſſurances wha ever for payment of any principal or money to be lent, &c. upo any uſury whereupon or whereby there ſhall be reſerved or take above the rate of five pounds in the hundred, as aforeſaid, *ſhall utterly void.*

I cited the words on the prohibition and *annulling* clauſe, becau it is upon a loan of money, or the like, where, upon the *forbearan* of the principal, more than five *per cent.* is taken. And the ſtatu ſays *directly* or *indirectly*; and therefore you muſt get at the *ſubſtan* of the tranſaction. What is the commiſſion? what is the intent?

You muſt come at the diſcovery; that it is *borrowing* on one ſid and *lending* on the other. And *then*, if the *ſubſtance* be a *loan* o *money*, *no contrivance* in the wit of man, nothing applied to any *ap pearance* of ſale, will *allow* the *taking* of *more* than five *per cent.* o *ſupport*, from the *penalty*. And though the ſtatute mentions *goo* or *money*, yet that was mentioned as the *oldeſt* kind of *uſury*; but a *annuity*, or *any other kind* of invention, would *fall* under the *ſame*

Mr. *Dunning* found it ſo *material*, that in his reply he called hi the *lender*. How does it *appear*? It is in the courſe of *trade*, in ſeller of *gold and ſilver wire*, *otherwiſe* a *refiner*. The *borrower*, he is called, cannot juſtify *forbearance* upon *demand* a *moment* beyond the *day*.

Farther, it is *not* a *contrivance*. This is the *conſtant uſage* of the trade: and *ſo near univerſal*, that but *one exception* can be produced; and that very exception *proves* the *general* practice: For the witneſs who ſaid he took but five *per cent.* ſaid that the *reſt* of the trade were *accuſtomed* to take according to the *rate here ſtated*.

If an *encreaſe* of the ſum to be paid, though made *only* on the *contingency* of the money *withheld beyond* the day, be *uſury*, then the *Bank* of *England*, and *all* the merchants of *London*, are *guilty* of *uſury*: For they *diſcount* at five *per cent.* but if *not paid*, they *advance* the money; *not immediately*, but upon the expiration of a *few* days it *advances*, upon a *nice calculation*, and would not have occurred to me if I had not been put in mind of it; but if *this* were *uſury*, ſo is *that*.

Is this man a *lender* of money, under *colour* of *dealing* in ſilver wire? *No ſuch thing*.

Is it worth any man's while; in truth could he *live* by his *trade*, if he took five *per cent. inſtead* of the *money*, *to carry* on his *trade*?

If the money was *unpaid*, there is *no agreement* for an *hour's forbearance*. "I have in view to get my money back in *three months*: "*If* you don't pay me in *three months* you ſhall pay me an *advanced* price. I have *given* you three month's credit for nothing: "I don't chooſe to have my money unpaid; and will, therefore, "have a *ſanction* to *inforce the payment*."

How does it ſtand upon authorities? An *actual borrowing* of money with a *penalty* on forbearance is *no uſury*, if the *borrower can diſcharge himſelf* by *payment within* the time. And that caſe in *Croke*, which ſays this is *much ſtronger* than this caſe, by the difference of the *penal* ſum which is *greater*.

In the caſe of *Hawkins* it is *expreſsly*, that where in the *election* of the perſon *borrowing* to *diſcharge himſelf* this is *no uſury*. And *ſo* the *other* authority.

Not uſury where it is in the election of the borrower, at the time of entering into the contract, to avoid paying more than five per cent. by paying at the day.

I rely *moſt ſtrongly* upon the *original* contract being in the *way* of *trade*; becauſe *both* parties will then take care that the terms be *reaſonable* in the *outſet*.

It is of great force to prove a contract not uſurious, that it is in the ordinary courſe and practice of trade.

The miſchief is when there muſt a forbearance or the like, whether the borrower will or not, as a colour to draw more than the legal intereſt.

The miſchief is, when on the very *making* of the agreeme
there *muſt* be a *forbearance*; which *ſhews* that the *object* was *orig*
nally, *not* the *ſale* of the goods, or *ſecurity* againſt *detaining* t
money due, and *not paying* for them in a reaſonable time agree
but the *credit* given by a *contrivance* to raiſe an *undue intereſt* up
the *loan* agreed on.

Though it was very well argued at the trial and very ably ſinc
I cannot help thinking the jury did *right*, in thinking the contra
not uſurious becauſe in the *courſe* of *trade*; and it was in the *pow*
of the borrower to have *avoided* the *encreaſed* payment.

Naſh *againſt* Cox.

MOTION for a new trial—Dealings between plaintiff an
defendant concerning *reſpondential* bonds, the exiſtence o
ſome of which was out of diſpute; but as to *one* it's *exiſtence* w
diſputed.

Amongſt various other evidence the *clerk* of *defendant* was calle
as a witneſs, to prove that he had looked into his maſter's boo
(which appeared to have been loſt by an accident of the houſe be
ing robbed) and that there were entries of *a great many other reſpon*
dential bonds but *not his*.

Objection to the *competency* of this witneſs in point of law
namely, that being agent to the party he could not be evidence i
his behalf. The anſwer was—" you are very *right*; it is an ob
" jection *generally*: But there is *no* rule that does not admit of *ex*
" *ceptions*, and this is a caſe upon the circumſtances which appea
" to have been a *miſtake*; and it is evidence very *neceſſary*." O
this evidence the jury found for defendant.

Mr. *Bearcroft* ſaid he had taken a *great deal of pains* to get rid o
his *bias*; he was of counſel for the plaintiff.

Lord *Mansfield*—Upon *ſuch* a caſe it was not only your genera
duty but you were *bound*, whatever your *private* opinion might be
to move for a *new trial*. It is an objection of *great nicety*.

Mr. *Bearcroft* ſaid, that at the trial he *admitted* it as *evidence*,
his Lordſhip thought it *evidence*; and that he believed, he added fa
ther, that if it *was* evidence in *any* caſe it was *not fit* it ſhould b
left out in *this*.

Lo

Lord *Manſfield*—I left it to the jury that this evidence was not *legal* evidence; I left it to them on the *other* evidence from other books on *both* ſides; and you are always candid in complying with the *juſtice* of the caſe. But if it had been contended *pertinaciouſly* that *ſuch* evidence *ought not* to be *admitted*, I ſhould have told the jury that they would do *right* to *preſume*, the party who *refuſed* to *admit* ſuch evidence, *felt* it would go againſt him.

Mr. *Cowper*—That it was a very *nice* tranſaction and very *dark*, and of much *importance*; and *no prejudice* ariſing, except the farther expence it would be very right to grant a *new trial*.

Lord *Manſfield*—If you had made any *new diſcovery*, or had a *glimpſe* of new light it would have been a *ground*; but you had, or might have had *inſpection*. And as in the caſe of *Hull*, if you had applied for an inſpection the court would have granted it.

But what new evidence *can* come out? There is *no certainty*: It is upon *conjecture*; but they muſt find one way or other.

The *reſt* of the *court agreed* that, in ſo *uncertain* a tranſaction, the point *once ſettled* by a *verdict* on *either* ſide ought *not* to be *diſturbed*.

Larceny.

IF indigo be ſold in the *groſs*, and *as ſuch* (the buyer chooſing to have it in *groſs*,) and be *changed* by the *ſeller*'s taking *part* out and putting in indigo *duſt*, though it be in his *own* ware-houſe; if after the contract was *complete* by *payment*, it appears that ſuch taking is a *felony*, if the value taken be ſuch as would make it more than petty larceny ſuppoſing it had been ſtolen out of the *actual* poſſeſſion of the buyer. I ſuppoſe becauſe the poſſeſſion of the ſeller is the poſſeſſion of the *buyer* after the contract is compleated; and it was held by Lord *Manſfield* at *niſi prius*, and repeated in court, that ſuch taking would be felony, upon occaſion of evidence offered of this kind which Lord *Manſfield* held improper, (the action, I think, was an action of trover) becauſe if it proved any thing it proved a felony. And the ſeller, I apprehend, cannot be conſidered as bailee of the goods, becauſe they are not *delivered* to him by the defendant to keep or convey to him. And even if a bailee take part out, as a miller, who has corn to grind, *part* of the corn out of the ſack with an intent to ſteal, it ſeems this hath been held felony; and ſo of a carrier taking *part* of the goods out of a pack; for ſuch a *ſpecial bailment* of a *part*, *diſtinct* from the *whole*, was *not* given him. Though perhaps this latter reaſon when it was firſt introduced was a little refined and *aſtute*, if not *over ſubtile* in the caſe of life: But probably the ground of this ſubtilty was this, that if the *whole* be take the injury is more *apparent*, and the *direct* remedy for the breac of truſt eaſier; farther too, if the *bailment* is determined by th goods arriving at the place of *delivery*, though they be ſtill in th *poſſeſſion* of the bailee, it is *felony* if he takes them. V. *Wood's Inſ* *Title Larceny*.

ON a motion upon a rule to ſhew cauſe why, on filing *commo* *bail*, a writ of *ſuperſedeas* ſhould not iſſue on ſuggeſtion b affidavit, that the original *debt* was under 10*l.* but by *coſts* wa increaſed to 17*l.* and that therefore *ſpecial bail* ought *not* to be required.

To this it was anſwered that defendant *agreed* to pay debt an coſts, and by ſo doing made the coſts part of the debt, and was liable upon aſſumpſit.

Lord *Mansfield*—Can you turn a *judgment debt* into a *ſimple contract* one by the *ſame* perſon? If it had been a third perſon thi would have a conſideration.

But what was his *promiſe?* To *pay* a debt to which he was *liab* on *record*.

Anſwer—Not to the *ſame* ſum.

Lord *Mansfield*—He is *liable* by the *judgment* to the *coſts*. *Ru* *diſcharged*.

Mr. Juſtice *Aſhhurſt*—This *muſt* be one thing or the other. D you ſay by the promiſe the *judgment debt* is *gone?* Does it not *remain* ſtill a *lien* upon the *lands?*

14 June.

Doe on the Demiſe of Mears.

EJECTMENT.

Special Caſe reſerved.

DEMISE of a *rectory* by *indenture* for ninety-nine years *grantee* ſhould ſo long live.

The execution of the deed proved; but the ſubſcribing witne did not ſee the money *paid*, the grantor *acknowledged* the payment.

Pleaded againſt the deed that the demiſe was fraudulent; and al that the defendant was guilty of non-reſidence.

In ſupport of the firſt point, 13 *Eliz.* was pleaded to avoid the *transfer of livings* by *corrupt* and *indirect* agreement.

Objected, that there was no corrupt agreement or indirection ſtated.

As to the point of reſidence it was contended that the *abſence* muſt be *voluntary*, and not *unvoluntary*.*

21 *H.* 8. on non-reſidence.

Moore 343.

6 *Co.* 21. *b.* *lawful impriſonment* without *covin*, is a *good* excuſe.

Now here the plaintiff is under *ſequeſtration*, which is a good excuſe.

Lord *Mansfield*—Why the ſequeſtration is for the *neglect*, is it not?

Anſwer—No my Lord, it's a *proceſs* upon debt.

Lord *Mansfield*—You have not ſtated this in your caſe, and *ſequeſtration* is *no legal* hindrance from his reſidence, or ſerving the cure; only if he does not attend when the profits are taken away, *another* muſt be provided.

Sequeſtration not a legal excuſe for non-reſidence.

The *abſenting* appeared on the dates afterwards in the caſe to be in 1770, and the *ſequeſtration* not until 1772.

As to the abſenting, *Bunbury* 210—11. and *Cro. Eliz.* were cited.

Lord *Mansfield*—It ſeems a very *clear point*; the *only difficulty* was, upon the ſtate of the caſe it appears to be between two creditors.

JUDGMENT for DEFENDANT.

Moved, that the plaintiff may be *non-ſuited*.

Lord *Mansfield*—This follows of courſe; let a *nonſuit* be entered againſt the plaintiff.

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* Neceſſitas excuſat legem.
Lex non cogit ad impoſſibilia.

Heeling

14 June.

Heeling *againſt* Heeling.

CASE for certificate out of Chancery, teſtator, *anno* 1732, bei ſeized of divers premiſes particularly ſtated, makes his w and deviſes *all his freehold and copyhold eſtate* in *Eſſex* to his wi without impeachment of waſte; remainder to his ſons; remaind to his own right heirs in tail ſucceſſively; the reſt and reſidue his wife. At the time of making this will he was entitled to t three-fourth parts of a copyhold in that county as mortgagee, whic he purchaſes *after* the making of the will; and *afterwards*, in 173 purchaſes *another* four-fifths of the ſame eſtate, and *ſurrenders* it the uſes *declared*, *and to be declared* by his laſt will and teſtament writing. And in *February* 1736 he *ſtrikes* out of his will a legac to the poor of *Hexham*, and enters a *memorandum*, ſubſcribed by tw witneſſes, that it was ſtruck out by his the teſtator's order and his preſence, he having paid the legacy in his wife's time: Upo theſe facts the queſtion out of Chancery was directed.

Whether any and what eſtate paſſed in the three-fifths of the copyho under the mortgage, and in the other four-fifths ſince purchaſed, and what uſes?

Upon the argument of the caſe it was relied againſt the deviſe that lands could not paſs by force of the ſurrender, to uſes of a wi made *before* the ſurrender and purchaſe. And 2dly, if the word of the ſurrender were proper, admitting that by *proper* words the might paſs; next that the ſtriking out the legacy *after* the purcha and ſurrender was *no republication*.

Laſtly, that lands in mortgage at the making of the will coul not be intended to paſs in ſettlement, and therefore would not thoug after purchaſed in fee.

On the firſt point it was ſaid in ſupport of the argument again eſtates ſubſequently purchaſed, paſſing under a ſurrender made *afte* the will, that if copyholds are to be conſidered as freehold, *none* ca paſs which were purchaſed after the will; for a will is conſidere as limitation of uſes, and no man can limit an uſe which he ha not.

Bunker and *Cook*, *Salk. Fitz-Gibb.* lands deviſable by the cuſtom lands deviſable *ut bon. et cat.* will not paſs purchaſed after the will.

Cutter and *Harriſon*, the will diſpoſes of *all* his real and perſon eſtate in the reſiduary clauſe.

I

In this caſe, ſurrender to ſuch uſes as he *ſhall* declare in his will. This, indeed, is ſpeaking in the future time, but not improperly, perhaps, if the will be underſtood as ſpeaking at the time of his death, the uſes which ſhould then *appear* to be declared; but nothing would paſs which had been purchaſed after. If they can in any caſe, though ſubſequently purchaſed to the will, they will not paſs under the words of the ſurrender.

There is no diſpoſition in the will which muſt include theſe lands: The deviſes are in ſtrict ſettlement, and cannot include after purchaſed lands, nor lands holden by the teſtator in *mortgage*. The reſt and reſidue is to his widow; it may refer to that uſe: It is impoſſible to ſay to which uſe it ſhall paſs. Nothing in the ſurrender diſtinguiſhes to which of theſe two different uſes the ſurrender ſhall operate. Then the eſtates will deſcend according to the title ſtated.

It is ſtated, as to the ſecond principal point, that *after* the purchaſe the teſtator *ſtruck* out a legacy he had given to a charity, as having ſince the making of the will paid it. This cannot be anſwered till it appears what is intended to be made of it; as no caſe ſeems to go ſo far as to call it a republication.

On the other ſide, Mr. *Dunning*—I can put no other conſtruction upon the words *declared*, or *hereafter* to be declared, than a proviſion for a will *already* made, and a will hereafter to be made. And the ſurrender will attach either to the *paſt* will, or to another, which the teſtator ſhould leave as his laſt.

The teſtator, when he made this ſurrender, could not but know he *had* a will *already* executed; and by the ſurrender as fully connected the will with the ſurrender, and *incorporated* it, as if he had *recited* it. And then, if this will ſhould *finally* be his will, when he came to die, then that the paſt; and if he made another, and left that, then the other ſo made ſhould limit the uſes of the ſurrender.

In the limitation of powers it is not neceſſary to refer to the powers. Can any man doubt, that even of freehold a man may ſo diſpoſe that the uſe ſhall attach to a precedent will. If a man ſays "*All* the lands I have purchaſed, or ſhall hereafter purchaſe, ſhall "go to the uſe of my will," can they not? If in a conveyance he recites the intent to be to the uſe of a former will? Will this, or has it ever been held it would, exceed his power?

The caſe cited was candidly acknowledged to have affirmed that a ſurrender may effectuate a paſt will, but that in the caſe there the ſurrender was *not* in ſuch terms as could refer to a paſt will, it was to ſuch uſes as he *ſhould* declare. This was a *future* will: And it was ſo expreſſed that it could with no propriety be applied to a will al-

ready made. And your Lordſhip only determined that, when a m ſpeaks of what he *ſhall* do, he does not mean what he *has* don The words are here *declared*, which is a recognition of a declarati of uſes *already* made.

When it is ſaid the uſes are *doubtful*, it muſt be conſidered th theſe copyholds are in *Eſſex*, and this will refer to lands in *Eſſex*, a not to *other* deviſes not under that deſcription. Your Lordſhip, to the admiſſion, will refer that back to the date of the ſurrender.

Lord *Mansfield*—This will do no good; theſe are certainly m ney: If it had been purchaſed it might be different.

Mr. *Dunning*—I alluded not as thinking it neceſſary to the ca but becauſe it was a circumſtance which the court of Chance thought proper to be inſerted.

As to the circumſtance of *republication*, he *adverted* to his wi and ſhews he did by ſtriking out the legacy he had paid in his li time. Therefore he *altered* what he meant to alter, and meant t *reſt* ſhould *ſtand* according to the *preſent* circumſtances of his eſta And *Ver*. 230, obſerves that republications are *very much favoure* and very *ſlender* evidence will do to ſupport them. If this was *ſle der*, this authority decides the effect even of ſlender evidence up that head: But I take this *not* to be *ſlender* evidence; for it is *man feſt* by it that he meant his will to ſtand as it was, and take effect his death (according to the circumſtances at the time of ſtriki out the legacy, as ſtated) in *all* reſpects, but for *that* deviſe, whi was ſtruck out.

1 *Roll's Abr*. 617.

The whole effect I contend for is upon the ſurrender, conſideri the will as incorporated with it; and upon that I moſt confident rely the court will be of opinion for my client.

Mr. *Mansfield*, in reply—I ſubmit, that the caſes cited were n of lands. An alteration of a *perſonal* bequeſt, amounting to a *repu lication*, to ſupport a *ſuppoſed* deviſe of *real* property, muſt be ve *new*. But beſides what is this? Does it make any alteration in t operation his will would have had if the legacy ſtruck out had ſto there, except only retrenching that legacy? Even a codicil, wi *three* witneſſes, has been held *no republication*. *Rogers* and *Gibſo Vezey*. “I deſire this may be taken as a *part* of my laſt will, y *no republication*.

Lord *Mansfield*—Was this ever queſtioned? It is impoſſible make a doubt. You don't ſtate the caſe. It is *juris tritiſſim* There may indeed be a will *ſo* made that a codicil can have *no* eff upon it, as to *new* purchaſed lands. A man may make a will, a

devi

deviſe *A. B.* and *C.* a codicil can have no effect upon this to paſs a new purchaſe, not lying in *A. B.* or *C.*

As to the uſes *declared*, or *hereafter* to be declared, Mr. *Mansfield* ſaid it is mere *form*, put in by the attorney, or poſſibly by the ſteward, and no proof of his adverting to a precedent will, which is contended to be meant by the expreſſion “ declared.”

Lord *Mansfield*—If there had been no forecloſure of the equity of redemption, the mortgage would have gone to the widow. The money due was *perſonalty*, and the eſtate is a ſecurity, therefore it ſhews his intent upon the will, that it ſhould paſs *when* the will was made.

His Lordſhip gave the judgment of the court to this effect.

The teſtator by his will, in 1732, deviſed to a number of uſes; all the reſt and reſidue to his wife, her heirs and aſſigns, and appoints her ſole executrix.

Afterwards he purchaſes other copyholds, and in *October* 1735 ſurrenders to the uſes, intents and purpoſes, *declared, or to be declared by his laſt will* and teſtament in writing.

In *February* 1736 the legacy to the poor of *Hexham* ſtruck out, and a memorandum, ſubſcribed by two witneſſes, that it was ſtruck out by the teſtator's order, and in his preſence, he having paid the legacy in his life-time. The queſtion comes from Chancery, whether any and what eſtate paſſed in the one-fifth of the copyhold under the mortgage, and in the other four-fifths ſince purchaſed, by the will and ſurrender, and to what uſes?

In this queſtion, upon reading the caſe, I *never had a doubt.*

When a man, having made his will upon a ſubſequent day, *republiſhes* it, what is the conſequence? That the property he is ſeiſed of at the *date* of the republication is as if he had been ſeiſed of it at the *date* of the will; therefore if the will be of *B. C.* and *D.* republication has no effect, as to other lands, becauſe the will does not ſpeak of any other lands.

The caſe in *Vez.* muſt be upon a queſtion of a codicil merely of perſonalty I have not had time to look into the caſe quoted as before me; but, as to ſurrender, I am quite of opinion as Mr. *Mansfield* ſays I was in that caſe. A ſurrender may be by *reference*, and every reference takes in the thing referred to, and the ſurrender is the *form* of conveyance. Here the teſtator, having made his will, and declared the uſes of *all* his copyholds in the county of *Eſſex*, makes a ſurrender to uſes *declared*, and *to be declared*, to cure the difficulty of lands *after* purchaſed, *verba relata ineſſe videntur*. It ſpeaks as if the lands *had* been purchaſed at the *making* of the will. As if it had been, " Whereas I have made a will, and deviſed co-" pyhold land in *Eſſex* to certain uſes, I deviſe theſe lands in *Eſſex* " to the ſame uſes."

As to republication, it is *unneceſſary* to the caſe, and it may be made a queſtion whether he meant any more than to ſtrike off the particular legacy, without *intending* any thing farther. Though, on the other hand, it appears as if he had a mind that in all other reſpects the will ſhould operate as to every thing which he had at the time of the alteration made.

Mr. Juſtice *Aſhhurſt* mentioned the caſe in *Vez.* alluded to, which he ſaid was thus: He recited, " Whereas he had, by his laſt will, " given a legacy, in truſt to *A.* and another to *B.* he revokes this " legacy, and deſires this may be conſidered as a part of his will."

The reporter ſays that thoſe on the part of the heir ſeemed to give it up, who argued againſt it's being conſidered as a republication.

Action on Promiſes.

Set-off.

SEVERAL counts; for goods ſold and delivered, work and labour done, and money had and received.

Plea of ſet-off.

It being in the caſe of a bankrupt, it was argued, that it is a *principle*, that a defendant owing money to the aſſignees of a bankrupt, *cannot ſet* off a debt due upon the eſtate of a bankrupt againſt the aſſignees, on the 3 *G.* 2. for all ſet-offs muſt be *mutual* debts, and the *bankrupt* cannot ſue for a debt.

Lord *Mansfield*—Why?

To this it was anſwered, that upon the general doctrine it has been contended, (*Wilſ.* 158) that wherever there are *mutual* debts there muſt be *mutual remedies*; and the defendant can have *no* action of debt upon the bankrupt.

Statute 5 *G.* 2. That the commiſſioners may *adjuſt* the difference, and *ſettle* the balance. Debts accruing *before* the ſuing the commiſſion are alone provided for by that ſtatute, and not debts ſince.

Lord *Mansfield*—It won't do them juſtice: The aſſignees are the *bankrupt*. Except in caſes where the ſtatute interpoſes you can't bring your action; you *muſt* go before commiſſioners; the *aſſignees* are in a ſummary authority for the diſtribution and ſettling of the debts.

It was a *narrowneſs* in the law, or rather in the *determination* of the law, that you could not ſet *one mutual* demand againſt another formerly, in *common* caſes.

Mr. Juſtice *Aſhhurſt* cited a caſe where the defendant gave notice of ſet-off againſt the aſſignees.

Mr. *Cowper* ſtill urged, upon the ſecond ground, that it was a demand of a debt due *ſince* the bankruptcy, which was therefore a debt due to the aſſignees.

Bankruptcy is in the nature of a *civil* death; the aſſignees are *exactly* in the place of the bankrupt. If the principle contended for were admitted, the bankrupt's eſtate would be encreaſed by his bankruptcy, *which the law will never allow.*

2 *Vernon*, 173 (Qu. for there is no ſuch caſe in that page). In the caſe of a bankrupt, where there are dealings upon account, the creditor ſhall not be put to account. *Deeſt aliquid.*

Lord *Mansfield—Never truſt any note cited, when not conſonant with the general principles of law, juſtice, and equity—It muſt be wrong.*

As to the debt due to the aſſignees *ſince* the bankruptcy, there was *one* of the counts charging *before* the bankruptcy; but argued on the general rule, that both pleas went to the *whole* declaration, and that the *laſt* was *bad*, being of goods ſold and delivered to them, as aſſignees, *ſince* the bankruptcy, and would effectually *vitiate* the *whole.*

LEAVE to AMEND the PLEA; both the pleas going to the whole of the declaration, and one being inapplicable.*

Curia Cancellaria. Baron Apſley Chancellor.

Jenkinſon *againſt* Watts.

From the Maſter of the Rolls, in Form of an Appeal, but in Nature of a Re-hearing.

WILL made by Mr. *Watts*; deviſe of capital manſion-houſe and eſtate, in ſtrict ſettlement. Afterwards he makes a

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* Quæras ulterius velim amice lector.

new contract with the Duke of *Kingſton*, for *Hanſworth* manor, an in *Bucks*, for 40,000 *l.* codicil to diſpoſe of the eſtates newly pur chaſed to the *ſame uſes* as thoſe in the will.

After this, having the *equitable* eſtate in himſelf by the contrac he takes the *legal* intereſt to it by *abſolute* purchaſe. And the que tion was, whether this was not ſuch a *change* of eſtate as amounte to a *revocation* of the uſes under the will.

For the appellants—This, if it be a revocation, cannot be *expreſ* but muſt be *conſtructive*. There are two ſorts, one importing a di ference of *intent*, from the circumſtance of a *new* inſtrument mad though that inſtrument in itſelf void; or elſe upon reaſons to ſu poſe that the eſtate given was *annihilated*. The firſt cannot be th caſe *here*; nor moſt clearly can the *ſecond*, in any propriety, be a firmed.

Montague and *Jefferys*, reported in *Moore*, which is the caſe Roll's *Abr*. "*None of the acts intended to complete, perfect, and carr* "*into execution the intent of the teſtator is a revocation.*" The a tornment of a tenant to another, for the teſtator, who had made will; this, though it changes the eſtate, is *no* revocation; partitio *no revocation*.

This, it is remarkable, was a truſt ſtrictly *executory*, as in th caſe of *Bagſhaw* and *Spencer*: This was a truſt to be *executed imm diately*. The court would have conſidered the *benefit* of the contra as *deviſable*, and would have executed it.

And a contract made by the teſtator would have been execute 2d *Chancery Caſes*, 144, *Prideaux* and *Gibbons*. *Amery*, the teſt tor, deviſes all his lands to be ſold for the payment of debts; t lands in queſtion were *afterwards purchaſed* by him. And the cou decreed they well paſſed; and that if a man deviſes lands *after* pu chaſed, a decree ſhould go for a ſale for payment of debts. Wh Lord *Hardwicke* determined, as to change of eſtate operating a r vocation, was law; but the *dictum* goes much farther, and is not, dare ſay, in the regiſter.

Lord *Nottingham* decided the caſe, that a truſt for a particul purpoſe was *no* revocation.

Lord *Hardwicke* [*Parſons* and *Freeman*] ſaid, that the ſame ru holds of revocation of an *equitable* intereſt as of a *legal* eſtate, a it would be very dangerous to property if it were otherwiſe. A that a truſt for a *particular* purpoſe ſhould be a revocation *pro tan* only.

Tru

Truſt *executory* is diſtinguiſhed ſtrongly by his Lordſhip in *Bagſhaw* and *Spencer*.

In our caſe what was done was a ſtep to complete the purchaſe, as in *Parſons* and *Freeman*, *Sparrow* and *Hardcaſtle*. And it is like livery and attornment, and the other ſteps to complete the purchaſe.

3d *Atkins*. The *principle* on which Lord *Hardwicke* determined goes with us. He recognizes the caſe of *Montague* and *Jefferies*, and ſays it appears to him that *Roll* had a much better note than any of the other reporters.

On the ſame ſide, Mr. Solicitor-general—That this was a *deviſable* intereſt, and *was* deviſed by the codicil in ſuch a manner as was ſufficient to paſs it. The only queſtion, therefore, is, whether there were a revocation?

As in the caſe of *Elton* and *Harriſon*, in the caſe before Lord *Nottingham*, upon appointment of a new truſtee.

If it be any it muſt be a *virtual* revocation, *Lamb* and *Parker*. *Virtual* revocations muſt be by expreſs implication.

Intention is leading upon all caſes of *revocation*; and the court will require that *animus revocandi* ſhould appear: And therefore a revocation, on the idea of a *valid* will made, which turned out *not* valid by the ſtatute, was held to be *conditional only*. *Onyons* and *Tyrers*. [*P. W.* and *Vernon*.]

He directs payment of the purchaſe-money out of his perſonal eſtate, and declares the uſes ſhall be the *ſame* as in the will.

The conveyance was *no voluntary* act, as that in the caſe of *Elton* and *Harriſon*; but was an obligation upon him, which he was under a *neceſſity* to perform, when he made the codicil.

Mr. *Reade*, *contra*—We ground ourſelves upon the ſaying of Lord *Hardwicke*, as is done on the other ſide, that the ſame rule of revocation applies to *equitable* intereſts as to a *legal* eſtate.

A great deal of doubt has been endeavoured to be thrown upon the conſtruction of a revocation at common law.

Partition is only the poſſeſſion of the *ſame* eſtate, in a more reſtrained degree. The parcener is ſeiſed *per my* and *per tout*.

As to *diſſeiſin*, it would hardly have been a doubt, if it had be
conſidered that a diſſeiſor has his *election*, whether he will conſid
himſelf as *in* his eſtate, or *out* of it; and by his entry he *determin*
his election.

In the caſe of the ſettlement of my Lord *Lincoln*, the eſtate h
been diſplaced in the ſettlement to an uſe *reſulting* to my Lord *Li*
coln himſelf, in the uſual manner; whereupon the *ſpringing* u
which are limited in marriage ſettlements in general, upon a fut
contingency, were defeated.

An *equitable* intereſt was conſidered as a mere choſe in action,
it was originally; but at this time it is *deviſable*, *deſcendible*, and i
dued with thoſe other properties which belong properly to the *leg*
eſtate.

And this court has ſo proceeded, and provided for what is origin
ally called an *equitable* intereſt, and eſtabliſhed a perpetual *analogy* be
tween the *legal* eſtate and that intereſt.

As to the caſe in *Roll's Abr.* I can't help underſtanding the thir
placitum as repeating the law upon the ſecond, with an expreſs con
tradiction to it. The ſecond caſe was of uſes continuing as well a
ter the conveyance as before, whereas the other was he had a lega
eſtate *not* deviſable; afterwards he has an uſe *deviſable* by the ſta
tute.

It has been argued that a *partial* alteration of the eſtate would b
a revocation only *pro tanto*. The caſe of *Coles* and *Hancock* was ci
ted. There was an *after-born* ſon. In order to ſubject the eſtat
to the will, the court decreed the deed ſhould be ſet aſide, upon th
clear reaſon of inſanity in the former part of the caſe reported.

It was ſaid in this caſe there can be no poſſible argument of in
tention; whereas, in one of the caſes cited by himſelf, the ſam
learned gentleman takes notice the queſtion was, whether a deed
made to give effect to his will by the teſtator, would operate as a re
vocation.

The purpoſe they have ſtated, of the intent (this was ſuggeſte
extr. cauſ. to have been to avoid dower) is not evidence; and I onl
ſtate it as a mark of their *anxiety*, and ſenſe that if they can't rebu
the evidence of a *different* intent, ariſing from a different diſpoſitio
of truſt, they muſt fall.

The will has *particular* truſtees; theſe are *changed* by the deed.

Th

The *nature* of the eſtate in equity is *different:* The eſtate in the contract was a *conſtructive* equity; the equity by the ſubſequent inſtrument was an *expreſs* equity.

On the ſame ſide, Mr. Attorney-general—It is the doctrine of my Lord *Hardwicke*, that where the teſtator does *any thing inconſiſtent* with or *working upon* the thing deviſed, this is underſtood a *revocation*; that is to ſay, a *change of deſign, implying* and *amounting* to a *revocation*.

Here the truſtees under the will were neceſſarily the ſame under the codicil, as there was no *new* appointment of truſtees in the codicil; therefore the *conveyance* muſt be change of deſign, as it introduces *new* truſtees.

Swinburne 545. A teſtator deviſes a houſe, and pulls it down and builds *another*; the legacy is extinct, caſe mentioned of truſtees by *will* to pay his debts, truſtees to the *ſame uſes* by his *deed*; this a revocation.[*]

The reaſons why a leaſe partition and the like were no revocations, is that a *partial* change of diſpoſition went no farther than to import a change of intent *coextenſive only* with that of diſpoſition, and not beyond it, that is to ſay, produced only the effect of a revocation *pro tanto*. But the parting with the *whole* fee of a man, that is to ſay *legal and equitable* eſtate, is a revocation.

Courts of Equity have in all caſes of ſpecial purpoſe (and there is no difference in the rules of common law) determined, that the revocation was *partial: Only* ſo far as was neceſſary to anſwer the *ſpecial purpoſe*; but the change of truſtees amounts to an intention of acquiring a *new* eſtate, and in the conſtruction of law this is the effect: And if this ſeem *artificial* reaſoning, and be therefore objected againſt, it is not to be wondered if this reaſoning be applied in favour of the heir, who has a *right* to avail himſelf of *every inaccuracy* and breach of the rules of law, whether founded on principles of general reaſon, or particular and *technical* refinements, reſulting from its peculiar principles of conſtruction.

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[*] This caſe ſeems curious and extraordinary enough and worth looking into; if there were other legacies or deviſes ſurely it could not affect them, it appears indeed clearly enough a revocation *pro tanto*; that is to ſay with reſpect to the truſtees and *quoad* them merely. If indeed the object of the will was merely the payment of debts when new truſtees were appointed, perhaps this was of a revocation; but yet not in the ſenſe of letting in the heir: For the ſecond will would operate in the place of the firſt, with the alteration only of truſtees; and if the ſecond truſtees had been perſons incapable. I ſhould not have conceived, without expreſs revocation of the former will, this change of appointment would have been ſo conſidered to revoke the former, as for want of it's capacity to take effect to let in the heir: But rather that the firſt will would have ſtood which had taken means good in law to execute the ſame object. Whatever doubt this latter remark may have, there ſurely can be none that it muſt be very extraordinary if an appointment of truſtees to pay, and afterwards new truſtees appointed for the ſame end, be a general revocation of all parts of the former will.]

Mr. *Maddocks*—I cannot help quoting the ſentiments of Lord *Mansfield*, *Swift* and *Neale*, 3 *Bur*. 391. where he ſays, *conſtructive revocations againſt the intent ought not to be indulged*; *and ſome deciſions of that ſort miſunderſtood or over-ſtrained, have brought a ſcandal upon the law*.

On the ſide againſt the revocation, it was put in a very fair light by Mr. *Maddox*, if the appointing of new truſtees argued an *intention* to alter or revoke the will, this is a revocation; was this, to which he was *compellable*, taking the conveyance and paying the money, an *intent* to ſet aſide his will? But the ſame argument was *attempted* on the will of Sir *G. Amiens*, before the Lords Commiſſioners; there it was contended a legal eſtate acquired, after an equitable intereſt given by a will, would not paſs; but without effect.

I will ſubmit to your Lordſhip, that the conſtruction upon *equitable* intereſts is in many *palpable* inſtances *different* from that in *legal* deviſes; but, admitting the propoſition, how far will it go?

A recovery, a fine ſuffered.

A bargain and ſale (not for money) though the *uſes* are reſerved to himſelf, is a revocation; but where is the caſe determined at law, which affects the caſe before your Lordſhip? none, but the caſe in *Roll's Abr*. This is not the caſe of a *deliberate* conveyance changing the uſes; in this caſe here is an *equitable* intereſt *at* the making of the will; an equitable intereſt *after* the will; only the *perſon* changed who *holds* the *uſes* in truſt.

In a former caſe the court has held, where the uſes were reſerved upon the conveyance, and the *ſame* ſubſtantially continued only to *different* perſons, this was *not* a *revocation*. Truſts, it has been often ſaid, were ſubſtituted inſtead of uſes, with equitable intereſts; this is the ſame caſe, and the change of an uſe in like manner would not have been a revocation.

I don't agree that a court of equity is bound *entirely* by the *ſame* rule as a court of law; which may underſtand itſelf bound by a caſe decided, though on *wrong principles*, rather than ſhake the precedent and introduce uncertainty.

A man at the execution of his will makes a mortgage in fee; the money is paid and he takes back the eſtate: It might have been a *dangerous* queſtion at law, whether the new eſtate thus created would paſs: [Qu. whether this or near was not determined in *Heeling* and *Heeling*.] And yet it would be very extraordinary if a court of equity ſhould ſay, that if the money had not been paid at the death of the mortgagee it would have deſcended, ſubject to the equity of redemption; but as he has *paid* the money this ſhall be a *revocation.*

Lord Chancellor—This queſtion, when firſt it came on, was treated as a matter quite of courſe; and to be ſure it ſtruck one *very much*, that when a teſtator, *having contracted*, makes his will, and afterwards, in conſequence of ſome agreement, makes a conveyance to truſtees in *truſt* for *himſelf*, that the uſe ſhould paſs *juſt as it would have done.*

The caſe of *Elton* and *Harriſon* ſtruck me, and I deſired it might be argued; declaring, I ſpoke *no opinion*, but only, as a queſtion of ſome property, deſired it might not paſs over without argument.

The caſe is a very *common* one. A man having an *equitable* intereſt deviſes it by will; and afterwards takes back a *legal* eſtate; whether this ſhall paſs or not.

In the caſe before Lord *Hardwicke* when it was argued, (*Parſons* and *Freeman*) Mr. Solicitor-General (now Lord *Mansfield*) argued, that there might be a difference between the conſtruction of a *legal* eſtate and an *equitable* intereſt,—Lord *Hardwicke* in making the decree ſaid, A doubt was made whether there might not be ſome difference between a *legal* and *equitable* eſtate. But I am of opinion the the caſe would be the ſame; and it would be of very *dangerous conſequence* if it were otherwiſe.

The queſtion then will be—whether it would be a good deviſe of a legal eſtate; for, if not, I doubt very much whether the court here ought to decide it as good upon an *equitable* intereſt.

Mr. Solicitor-General very ably argued for his client, that the rule of law and equity went upon the ſame principles; and therefore this court has decided upon the *ſpirit* of that of the law.

A *different* diſpoſition is to operate on the eſtate as a *revocation pro tanto only*, in conſtruction of the *law*; and therefore this court, where the deviſe was of the *legal* eſtate, would preſerve the equitable intereſt ſo far as was not *altered.*

If this was an alteration of the *entire equitable* intereſt, I ve
much encline that it would be a *revocation*; and if no diſtincti
could be taken from the caſe before Lord *Nottingham*, I ſhou
think ſo. And in *Parſons* and *Freeman*, the eſtate in truſtees b
ing *altered* by appointment of *new* truſtees, without any *particul*
purpoſe appearing, was held a creation of *new* uſes, in ſuch mann
as to make a *revocation*.

In the caſe of *Rolles* it does not *clearly* appear whether it was
the direction or with the *knowledge* of the teſtator; and by *eve*
rule of *law*, if done without his conſent, it *cannot amount to a rev*
cation.

It is very clear, where the equitable intereſt was *in* the teſtato
who after takes a *legal* eſtate, that ſuch legal eſtate, *annexing*
the equitable intereſt, makes *no* alteration in the will, whereby th
equitable intereſt has been deviſed.

Does this come up to that? Upon due conſideration I am ve
clear it *does*. Mr. *Watts* contracts with the Duke of *Kingſton* f
the purchaſe of this eſtate.

The vendor, in the eye of this court, is ſaid to be a *truſtee*; b
not in the *idea* of *truſtee* to *create* a *revocation*, by *conveying* th
truſt *out* of his hands *into anothers*. He is only a perſon on whom
the purchaſer may call to *compel* a conveyance, and where a bill
brought for a *ſpecific performance* the decree is, that he ſhall conve
to the *vendee*, or *ſuch* perſon as he *ſhall appoint*; what then does th
vendor? No more than the court would have done for him.

It is exactly the caſe where a man makes a feoffment *before* a wil
and makes livery *after*. This is no alteration of his *intent*; but onl
carrying the former intention into *execution*. The court, unle
intent could be implied, will never deem it a *revocation*. Th
parting with the *whole legal* eſtate is a total revocation at law; th
parting with the legal eſtate in *part*, is only *pro tanto*; but in equit
the court here would conſider it *equitable* and decree it a revoca
tion *pro tanto* only, or *no* revocation, or *total*, according to the *pro*
portion of the equitable eſtate deviſed.

The argument is very *artificial*, that becauſe he *meant* the convey
ance ſhould be firſt made to truſtees by the Duke of *Kingſton*; (wh
might have taken it in truſt by the powers) and therefore in the mea
while until the conveyance the appointment was in *him*, that for th
cauſe the will of the teſtator is revoked, though the Duke is but th
hand to hold the eſtate for the purpoſe of paſſing it *expreſsly* to th
ſame uſes; it ſeems therefore not to agree with the *intent*, and th

artificial argument is *ſometimes* uſed in *favour* of the *intent*; but *hardly againſt it.** And if I underſtand right, it was not *intended* the Duke of *Kingſton* ſhould himſelf immediately convey to the truſtees. Mr. *Watts* takes on the *contrary* the *legal* eſtate in fee, and the *heir* at *law* ſhall be deemed *truſtee* for the *deviſes*.

I am not ſorry it has been argued; I am very much obliged to the aſſiſtance of my Lord Chief Juſtice with whom I have ſpoken and the very able manner in which you have all argued. The *prayer* of the *appellants* muſt be *refuſed*.

If I underſtood *Rolles* Abridged right, the laſt caſe put there was determined after the other.

Mr. Solicitor-General—My Lord I rather believe they were *neither* determinations; but *caſes put* and reſolved by the court.

Coſts.

MR. Juſtice *Willes* acquainted the court, that in caſe where he had doubted whether proceſs in original, on which coſts accrued, were a creation of a *new* debt, all his brethren informed him that it partook of the nature of the *original* debt.

COSTS out of pocket is a term for the largeſt coſts.

Bail.

MOTION to diſcharge *bail* on the recognizance upon a *commiſſion* of *lunacy*, which had iſſued againſt the *principal*.

Mr. *Wallace*—That this is not the caſe of a commiſſion of bankruptcy; that it is not certain he cannot diſcharge himſelf: But if an exoneretur be entered, if he ſhould become *ſane* the next moment, the bail would be diſcharged for ever.

Lord *Mansfield*—There ſeems to be *no* ground. They have been at the expence of the commiſſion; why does not the committee pay the debt? The debt muſt be paid out of his effects; it was one of the riſques for which they had undertaken.

At this rule we ſhould have *ſham* commiſſions of *lunacy*.

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* Durum eſt per divinationem tacitæ mentis a mente teſtatoris in verbis apertâ recedere; durius etiam ubi neque tacita neque expreſſa mens.

Attorney

SHALL not be called " *to anſwer matters of an affidavit* charging an irregularity but not a *crime*; for this motion is a *criminal* nature.

Overſeers.

ON a motion to ſet aſide ſeveral appointments of juſtices, conſtituting certain perſons named in the ſeveral appointments t be overſeers in the borough of *Bridgewater*.

There were counter appointments on one ſide; *one* appointmen made on a *Saturday* at ten minutes after twelve, and half an hou after twelve another; and on *Sunday* evening and *Monday* evenin two other ſeveral appointments at the ſame time reſpectively. O the other ſide they appointed preciſely *at twelve*, and *continued* th appointment every *minute* till *one*; and at *eight* o'clock on *Sunda* morning *another*.

The appointments on the former ſide were made by the *recorde* and *two* of the juſtices; the *latter*, by the *two* others, juſtices.

Contended that the appointments on *each* ſide on *Saturday* afte twelve, until one, *ſynchronizing* with each other; the appointmen by the *latter* party at *eight* o'clock on the *Sunday* morning woul *ſtand*; and that the caſe of *Milbourn* port was the ſame in *materia* circumſtances as *this*.

On Lord *Mansfield*'s aſking whether they went by the *ſame* clock it appeared they went by *all* the clocks and watches in the town according to their affidavits on both ſides.

On the other ſide—that in the caſe of *Milbourn* Port his Lordſhip determined that this raiſing on one another with appointments was a *proſtitution* of the office and a *profanation* of the day of th Sabbath.

Againſt this it was contended, that it had never been *ſtrictly* ſai and laid down as *law* in *any* caſe, that *Sunday* was a *bad* day for *appointment* of *overſeers*.

Swan and *Croke*, * Error from the Common Pleas upon a common recovery ſuffered; by conſent the *error* aſſigned was that th day

This ſeems to be Swan and Broome, Bur. 1525.

day of the return of the writ of ſummons was *Sunday* the 13th of *May*, 1750; on which day the tenant in tail male who was *vouchee*, *died without iſſue male of his body*.

There were two points made in this caſe, of which the ſecond in principle, though the deciſion was not on our ſide, the circumſtances differing, applies *ſtrongly* to the caſe *now* before the court, and applies a *fortiori*; it was—" whether by *law* a *valid judgment could poſſibly* be *given* on the day of the return, being *Sunday*."

In the judgment of the court it is *there* ſaid, *It is clear*, *if the court could not ſit on Sunday*, judgment *could not* be given *before* the death of the tenant in tail; for he died *upon* the *Sunday*. And then your Lordſhip decides the caſe upon the *hiſtory* of the law and *uſage* as to courts of juſtice, that *now* they *cannot* ſit on a *Sunday*. But your Lordſhip farther adds that *antiently* they *did*, and that it was the practice of the *antient* chriſtians for the reaſons there given, namely, amongſt others to do juſtice to their brethren, and prevent their reſorting to *heathen* judicatures where they muſt have ſworn by *idols*: And in contradiction to the ſuperſtitious obſervances of paganiſm,* but afterwards reſtrained by the canon, (517) and extended to all other holidays and faſt days of the church by the canon of the year 932. And that our *Saxon* kings received and adopted them, but that they were afterwards relaxed by the ſtatute *W*. 1. [3 *E*. 1. *c*. 51.] And farther that writs were *returnable* on *Sundays*, and notice to *appear* on *Sunday*; and that the *form* ſtill continues, though the true return and appearance is now on the *Monday*: And that *Wakes* were held on *Sundays*, until reſtrained by particular acts of parliament.

Now in this caſe of appointment of overſeers for the benefit of the *poor* and pariſh, if there be no affirmative uſage to appoint on *Sundays*, there is *no uſage* to *negative* ſuch appointment, there is no act of parliament againſt it; there is *no adjudged* caſe againſt it; and though courts of law do not now ſit on *Sundays*, this is no reaſon why an appointment by juſtices of overſeers ſhould be *void* if made on a *Sunday*; and the act ſays generally the appointment ſhall be in *Eaſter* week, which includes *Sunday*.

Lord *Mansfield*—*All* I am *thinking* is how I can contrive for ſomebody to undertake to *proſecute both ſets of juſtices*.

I don't know whether you would not have ſtood upon *better* ground if you had waited for a *legal* appointment on *Monday*, and ſuffered them to have gone againſt you by ſurpriſe on the *Sunday*.

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* Though this contrary extreme was likely to produce no leſs dangers of its own unleſs it were merely temporary, and perhaps it was *never* very *general* amongſt them.

You would have had a *much better* foundation both for the *appoin*
ment and *proſecution*.

The poor are ſacrificed while they ſtruggle.

The behaviour of the juſtices is a *ſhameful proſtitution* of th
office for *ill* purpoſes; if one ſide had lain by it would have bee
much better. It is an *horrible abuſe*, and I wiſh any could unde
take to *proſecute all four*.

I don't know there is any caſe *determined*, that *Sunday is* a d
for *ſuch* purpoſes; the act appears to *exclude* it by ſaying it ſhall b
in *Eaſter week* or a month *after*, which ſeems to *exclude Sunday*
for *Eaſter* week does not begin until *Eaſter Monday*; and the *gene*
ral reaſons given by Mr. *Hodgkins* go ſtrongly *againſt* it.

I will not give *my* ſanction for *ſuch* an act to *any* of them. I
all Sunday employed to *fraudulent* purpoſes.

Let all the appointments be ſet aſide; and let a *mandamus* go to th
juſtices to make a *new* appointment, and give *notice* of the time an
place of making the appointment; *two days* notice to be given b
the mayor to the *other* juſtices.

Suggeſted that one of them lives *twenty* miles from the place.

Lord *Mansfield*—Then I will *ſhorten* the notice: For I had rathe
he was *not* there—a man who comes for *ſuch* purpoſes! Let it b
one days notice.

I hope the note-takers will obſerve the appointments were *bot*
bad, and not determined by the *clocks*.

Juſtice of Peace.

A Man who acts as attorney, is not entitled to act as *juſtice*
peace. Vide 5 *G*. 2. *c*. 18. *ſ*. 2. but by the words of this ac
this does not extend to *charter juſtices*.

Judgment.

ON a motion to ſet aſide judgment upon a warrant of attorney
upon the ground that the perſon was in *cuſtody* at the time o
ſigning the warrant, to confeſs judgment; and that *no attorney* wa
preſent on his behalf at the time of the ſaid ſigning.

B

By *rule*, *E.* 15 *Car.* 2. *B. R. it is ordered* by the *court*, "That "no bailiff nor ſheriff's officer ſhall preſume to exact or take from "any perſon, *being in his cuſtody by arreſt*, any warrant to *acknowledge* a judgment but in the *preſence* of an *attorney for the defendant*; which attorney ſhall then ſubſcribe his name thereto; which "ſaid warrant ſhall be produced when the ſaid judgment ſhall be "acknowledged. And if any bailiff or ſheriff's officer ſhall hereafter offend, or do contrarywiſe, he ſhall be ſeverely puniſhed "for ſo doing."

And it is farther ordered, "That *no attorney* ſhall *enter* or *cauſe* "*to be acknowledged* or *entered*, any *judgment*, by colour of any "warrant gotten from any defendant being under an arreſt, otherwiſe than as aforeſaid."

S. R. in C. B. Hil. 14 & 15 Car. 2.

The defendant in this caſe, who entered into the warrant to confeſs judgment, *declared*, upon his *own* affidavit, that he *knew what it was*, but did it *becauſe it would be void*.

It was argued, that the court had been ſo *anxious* to *ſecure* this benefit to the defendant (which, to be a benefit, muſt be *certain* and *general*, and not to be *limited* by *circumſtances* of what a *particular* defendant might or might not know) that by a rule of 4 *G.* 2. the court, apprehenſive that the former rule might be ſo conſtrued that the *plaintiff*'s attorney might be thought ſufficient, provided that, for the future, none ſhould be good unleſs an attorney *named by the defendant* was *preſent*, and ſigned.

No rule or ſtatute ſhall be ſuffered to be an inſtrument of fraud.

Lord *Mansfield*—I ſhall ſay to the *rule* what the court of Chancery ſaid of the ſtatute of *frauds*, *that no rule ſhall be made an inſtrument of fraud*; *nor employed contrary to the ends for which it was made*.*

This rule was deſigned to *prevent* fraud by the defendant, otherwiſe *ignorant* or *fearful* of the plaintiff, being *drawn in* or *terrified* to *confeſs* a judgment; and *therefore* has *admitted* of *many exceptions* on the *circumſtances*: As in the caſe where a man in priſon at *one* man's ſuit executes a warrant to confeſs a judgment to *another*; this is within the *letter*, but *not* within the *intent* of the rule.

The court will *never ſuffer* this rule ſhould be made an inſtrument to *cheat* the *plaintiff*; which was introduced to *prevent* the plaintiff from *cheating* the *defendant*, or by any *undue influence* miſ-

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* Fruſtra legis auxilium implorat qui legem ipſam ſubvertere conatur.
Ratio eſt anima legis,

leading or overpowering him. He knew the *nature* of a warrant of attorney; he was *privately reminded* of the *conſequences*; he has the *effronter* to ſet before the court, upon his *own* affidavit, *that he knew that th warrant would not be good, being executed without his attorney bein preſent.* I am *not* at all *afraid* for the *rule*; for this will be a *precedent only* when it is applied as an engine of *fraud*, to *ſubvert* tha juſtice which it was made to *defend*.

Mr. *Waller*, in his defence before the *Houſe* of *Commons*, explain the *precept* of the *Bible*, "*Thou ſhalt not ſeethe a kid in his mother' milk*," thus—You ſhall not *turn* what was deſigned to *ſuppor* and *benefit* mankind into their *deſtruction*. Therefore the court wi *never ſuffer* a rule introduced to *prevent* fraud to be applied to th *purpoſe* of *effecting* it.

Archbiſhop of Canterbury *againſt* Houſe.

Adminiſtration Bond.

ON a motion to ſhew cauſe why proceedings on adminiſtratio bond, ſued in the name of the archbiſhop, ſhould not b ſtaid, with *coſts* to be paid by the defendant.

The defendant, a creditor, obtains from the proper officer of th biſhop authority to ſue in the name of the biſhop on the adminiſtration bond, on ſuggeſtion that the eſtate of the inteſtate was no likely to anſwer the debts; that his widow, the adminiſtratrix, wa going to abſcond; and that ſhe had not given in a true and perfe inventory.

The objection was, that it was *not competent* to the biſhop t give his name at the inſtance of a *creditor*.

Secondly, that if it were competent, they have commenced proceedings in this cauſe *without authority* from the biſhop.

Lord *Mansfield*—Surely it is competent for the archbiſhop t grant, at the inſtance of a creditor, where the executor has *not* delivered in an *inventory*, or has delivered in a *falſe* one.

28 *June*, 1745, *Greenſide* and *Ward*. Bill to be relieved againſt bond given to the commiſſioners of the eccleſiaſtical court, and i favour of a *creditor*, for want of a complete inventory. The bon

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Leges in bonum & ſalutem hominum nata peſſimum eſt in fraudem & pernicie hominum converti.

was *maintained* by my Lord *Hardwicke*, who would not *relieve* againſt it.

On the ſide of the creditor, Mr. *Dunning*—That though the complaint was nominally and *formally* againſt the archbiſhop, and the rule drawn up accordingly to ſhew cauſe why he ſhould not pay the coſts, yet there were other parties, who underſtood that it was virtually and ſubſtantially againſt them, and who defended accordingly.

That the reaſon why *no* authority is ſuppoſed to have been given by the archbiſhop is, that upon the defendant's being introduced to his Lordſhip's ſecretary, to enquire whether the proceedings were by the authority of his Lordſhip, he was informed by the ſecretary that there was no ſuch authority given: And that, by the advice of Dr. *Ducarrel*, who had informed him *no* ſuch authority *could* be given at the inſtance of a *creditor*, he had *refuſed* the application.

And that they received a ſecond anſwer, of the like nature, from the archbiſhop himſelf.

There *could* be *no* day afterwards, in which it could be conceived the archbiſhop was *otherwiſe informed*, or had *changed* his mind.

Whether the authority was *really* applied for *perſonally* will not be *neceſſary* to decide the merits; both they and the archbiſhop, by their conduct, evidently took the application to him *perſonally* would not be improper.

Farther, it does not appear whether the bond was not *applied* for, and conſequently obtained, after the action commenced; if ſo, *ſubſequent* to the action, it can *never* maintain it.

Beſides, if there be no oppreſſion from the archbiſhop, the court will not liſten to *ſuch* a complaint in *this* kind of proceeding, where the *other* party has been *oppreſſive*.

The next queſtion is, whether the *bond* be *warrantable*?

It will depend on the *nature*, the *conditions*, and the *object* of the *bond*, whether it were *competent* to make uſe of ſuch a kind of bond at the inſtance of a *creditor*.

What is the bond? If *A. B.* adminiſtrator, do make a *good inventory*, true *account*, and *diſtribution*, according to the act "*for the better ſettling of inteſtates eſtates.**" For this the *adminiſtratrix*

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* *Viz.* 22 & 23 *Car.* 2. *c* 10. the proviſion of which is thus: "That all ordinaries, as well the judges of the prerogative courts of *Canterbury* and *York*,
" for

trix in this caſe, the widow of the inteſtate, is made *liable*, and h
ſureties.

Perfect account and diſtribution is required—to thoſe who are
law entitled; that is, the *next of kin:* The creditors have *no* conce
in it.

Your Lordſhip, in the caſe of *Greenſide* and *Watts*, argued on t
reaſons why it was *competent* for a *creditor* to make uſe of an *adm*
niſtration bond. Your Lordſhip argues in a manner *unanſwerab*
or at leaſt I find *unanſwered*. The court did not ſtay executi
fully; but only *reſtrained* the uſe of it to *ſuch* inſtances as we
thought *competent* to a *creditor*. The *breach aſſigned* in that ca
was on the circumſtance of *not exhibiting an inventory*.

“ for the time being, as all other ordinaries and eccleſiaſtical judges, and eve
“ of them, having power to commit adminiſtration of the goods of perſons dyi
“ inteſtate, ſhall and may, upon their reſpective granting and committing of a
“ miniſtration of the goods of perſons dying inteſtate, after the firſt day of *Ju*
“ one thouſand ſix hundred and ſeventy-one, of the reſpective perſon or perſo
“ to whom any adminiſtration is to be committed, take ſufficient bonds, w
“ two or more able ſureties, reſpect being had to the value of the eſtate, in t
“ name of the ordinary, with the condition, in form and manner following, *m*
“ *tatis mutandis, viz.*

“ The condition of this obligation is ſuch, that if the within bounden *A.*
“ adminiſtrator of all and ſingular the goods, chattels, and credits of *C. D.* d
“ ceaſed, do make or cauſe to be made a *true* and *perfect inventory* of all and ſi
“ gular the goods, chattels, and credits of the ſaid deceaſed, which have
“ ſhall come into the hands, poſſeſſion, or knowledge of him the ſaid *A. B.*
“ into the hands and poſſeſſion of any other perſon or perſons for him, and th
“ ſame ſo made *do exhibit* or cauſe to be exhibited into the *regiſtry* of
“ court, at or before the day of next enſuing; and th
“ ſame goods, chattels, and credits, and all other the goods, chattels and cre
“ dits of the ſaid deceaſed at the time of his death, which at any time after ſha
“ come to the hands or poſſeſſion of the ſaid *A. B.* or into the hands and poſſeſſio
“ of any other perſon or perſons for him, *do well and truly adminiſter* accordin
“ to law; and farther do make or cauſe to be made a *true and juſt account* of hi
“ ſaid *adminiſtration* at or before the day of . And a
“ the *reſt and reſidue* of the ſaid goods, chattels, and credits which ſhall be foun
“ *remaining* upon the ſaid adminiſtrator's *account*, the ſame being firſt examine
“ and allowed of by the judge or judges for the time being of the ſaid court, ſha
“ *deliver and pay* unto ſuch *perſon* or perſons reſpectively as the ſaid judge o
“ judges, by his or their decree or ſentence, purſuant to the true intent an
“ meaning of this act, ſhall *limit* and *appoint*. And if it ſhall hereafter appea
“ that any laſt *will* and teſtament was made by the ſaid deceaſed, and the execu
“ tor or executors therein named do *exhibit* the ſame into the ſaid *court*, makin
“ *requeſt* to have it *allowed* and approved accordingly, if the ſaid *A. B.* withi
“ bounden, being thereunto required, do render and *deliver* the ſaid letters o
“ adminiſtration (approbation of the ſaid teſtament being firſt had and made) i
“ the ſaid court, then this obligation to be *void* and of none effect, or elſe t
“ remain in full force and virtue.”

I

Th

The *condition* in the bond in the caſe *now* before the court cannot make the adminiſtratrix liable to *devaſtavit* againſt her from the *next of kin.*

As to the aſſignment of a breach here for *not* making an *inventory*, it *could not* be aſſigned, *conſiſtently* with the *truth* and *juſtice* of the caſe. The real injury has been aſſigned, that the adminiſtratrix did not make a *true* and *perfect* inventory, which the ſtatute requires.

As to the *merits*, the circumſtances of *this* caſe *preclude* the application of the other caſe.

I ſubmit, therefore, the ground remains *entire* on both parts of the rule; though I am much leſs ſolicitous upon the firſt than the ſecond point.

On the other ſide, in reply, in behalf of the defendant, *Houſe*— That this application is well founded, and the rule ought to be made *abſolute.*

The archbiſhop did not underſtand himſelf as *perſonally* knowing and *refuſing*, but *officially*, without his *private* knowledge, giving them authority: The proceedings go upon a direct *contrary* ground.

The queſtion then is, whether the party to this rule, Mr. *Houſe*, *ought*, upon the circumſtances. to *proceed* upon this bond?

And whether he has not made an *improper uſe* of the bond?

An *inventory* was litigated, and therefore more *exactly* taken in this caſe, and there *could* be *no* breach aſſigned upon *that*.

As to the *formal* breach of the condition, your Lordſhip will *never ſuffer* him to avail himſelf of *that* who was *not*, *originally* (being a *creditor*) *intended* to take the benefit.

The order to an *eccleſiaſtical* judge, in matters ſubject to his juriſdiction, does *not* apply to a *creditor*, who, if he take any advantage, it muſt be a *caſual* advantage, by being able to charge the adminiſtratrix from the inventory ſo far, with *aſſets* in her hands.

The *non-payment* of a *debt cannot* be a *breach* of *this* bond.

The condition to abide by the ſentence of an eccleſiaſtical judge (which is the third object of the adminiſtration bond, provided by the act) *muſt* be for the benefit of the next of kin.

But farther, then, if the creditor *may* avail himſelf of *any* of theſ conditions, the claim being rather *foreign* to the *original* deſign, i *ought* to be on a very *equitable* ground; and *no ſuch* ground has bee *yet* aſſigned.

Lord *Manſfield*—*No next of kin ever ſtruggled* for the *adminiſtration* of *inſolvent* aſſets with an *honeſt* view.

The adminiſtratrix in *this* caſe ſhews *manifeſtly* what ſhe wante by adminiſtration: She wanted to *ſell* it to the creditor.

She gets adminiſtration—Upon this all the *chicanery* and falſe plea that *could* be made uſe of are applied, to defeat the creditor: And to *complete all*, and ſhew theſe obſervations are not ill founded, ſh *abſconds*.

A creditor (or creditors) takes out adminiſtration.

I chooſe to take as the *firſt* ground what is ſaid, "That *no creditor can have* the *benefit* of *this* bond; it *ought not* to be *aſſigned* t "him."

Next comes that the archbiſhop of *Canterbury* (in his privat perſon) has *not* aſſigned to him.

To be ſure, the archbiſhop of *Canterbury* and his ordinary are i the nature of *official* not of *private* perſons. But, waiving that fo the preſent, *what* is it that the archbiſhop is to do? *Ought* he to hav aſſigned, in *this* inſtance, to the creditor?

What is it that the act requires of him? He is to take a bond o the *proper* parties that they ſhall *account*, make a *full* and *perfect inventory*; and *diſtribution* is to be made to the *next of kin*.

In doing of *this* or any *part* of it the ordinary has *no* intereſt o his own; it is *ex debito juſtitiæ* to *grant* the bond, on *proper* circumſtances, and to the *proper* parties. If it ſhould be *abuſed*, it woul be a *good* reaſon to ſet aſide the bond, as an abuſe of *public* truſt.

It is ſaid this point has been *litigated* in 1745, but it does no appear upon what *authority*.

Two caſes were cited from that argument; which, it appears, were held then *not* to the point.

Intereſt of creditor in adminiſtration bond.

Let us ſee what are the points, as to which a creditor is *intereſte* in the adminiſtration.

I

It is *plain* the creditor has *no* intereſt in the *diſtribution after debts paid*; but he *has* an intereſt in a *good* and *perfect inventory* being given in; and a *true inventory*.

And he is intereſted in the *diſtribution before* payment of his debt, to ſee that it is not *ſo* made as to *exhauſt the* fund out of which his debt is to be anſwered.

The name of the archbiſhop is his *official* name, not the name of the *perſon*.[*] To one who *has* a *right* it is *ex debito juſtitiæ* to grant it; to *one* who has *no* right it is *ex debito juſtitiæ* to refuſe.

Archbiſhop name of office and not of perſon: Acting officially, he has no private or perſonal diſcretion, and his acts by his proper officers bind him, though without his perſonal knowledge, or even againſt his private will.

As to what was requiſite on this occaſion, I don't wonder the archbiſhop might not recollect it. He might refer to Dr. *Ducarell*: If Dr. *Ducarell* gave the anſwer which is ſtated he was *ill adviſed*.

If it reſted upon the anſwer of the archbiſhop it might be a *different* conſideration, as to *coſts*: But I am *aſtoniſhed* at what has *paſſed*.

Aylett, the attorney, applies to *Criſpin*, and aſks him by what authority he proceeds—who ſays he has no right to expect *candour*; in which, I think, he did *wrong*.

He then receives all the intelligence from *Vernon*—of a bill filed; of the advice given by him to the archbiſhop; of the reference to Dr. G. *Hayes*; and that the bond had been *permitted* to be *ſued* by the *creditor* upon *that* reference; and that he had *authority* to mention all this, as being informed by him.

What was he then to do if he doubted the truth, which was almoſt impoſſible? A man could hardly have had the impudence to invent all this; and it is ſworn he went to Mr. *Vernon*; if he did not, he ought.

This was on the fourth of *June*. On the eighth of *June*, in the morning, he applies for the rule, after all this information received.

And therefore, I think, the rule ought to be diſcharged *with coſts*.

I was only in doubt whether it ſhould be againſt the *repreſentative* or *Aylett*.

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[*] Aliud eſt dignitatis & officii publici nomen; aliud perſonæ & rei privatæ.

Rule discharged with costs againſt *Aylett*; to be paid *Aylett*.

Statutes and Caſes concerning Adminiſtrators.

Statutes, the foundation of their authority, 31 *E.* 3. *c.* 11. *an* 1357.

21 *H.* 8. *c.* 5.

22 & 23 *Car.* 2. *c.* 3.

9 & 10 *W.* 3. *c.* 41. Fees of adminiſtration to ſeamen's effec

Caſes. *Turner* and *Davies*, *T.* 22 *Car.* 2. *B. R.* 1 *Mod.* 62.

Adminiſtrator cannot have execution after his adminiſtration revoked.

Action for rent incurred in adminiſtrator's own time, *plene adminiſtravit*, is a bad plea. 26 *Car.* 2. *C. B. T.* 1 *Mod.* 185, 186.

Adminiſtrator muſt make diſtribution to the half as well as th whole blood. *Hil.* 27. 8 *Car.* 2. *C. B.* 1 *Mod.* 209. *Smith* caſe.

Adminiſtration pleaded, granted by the official of *A.* biſhop o *Carliſle*, good without alledging him to be ordinary. 2 *Mod.* 6 *Daws* v. *Harriſon*. *Hil.* 27. & 8 *Car.* 2. *C. B.* *Temple* v. *Templ* *Cro. Eliz.* 711.

Hodge v. *Clare*. Adminiſtration granted *durante abſentia* of an other good, as well as *durante minori ætate*. 4 *Mod.* H 2 *W.* *M.* But vide *Slater* v. *May*. 2 Lord *Raym.* 1071. That ſuch adminiſtrator muſt aver abſence ſpecially, to wit, in *partibus tranſmarinis*.

To be granted where there are executors if they refuſe to a which they may do by act as well as by words. *Broker* v. *Charte* *H.* 30 *Eliz. Cro.* 92.

Adminiſtrator of an executor no adminiſtrator of the firſt teſtato *Parſons*, alias *Frowde*, v. *Parſons*, alias *Frowde*. *H.* 31 *Eliz. B.* *Cro.* 211.

B

By cuſtom adminiſtrator may pay debt on ſimple contract, *pari gradu*, with debt on ſpecialty. *Snelling* v. *Norton*. *T.* 37 *Eliz. C. B. Cro.* 409.

Where *profert litteras adminiſtrationis* needs not be pleaded *quia* on record. *Earl of Shrewſbury* v. *Sir Walter Lewſon*. *M.* 39 & 40 *Eliz. C. B. Cro.* 592.

Where it muſt. *Sir John Cutts* v. *Bennet*. *M.* 14 *Jac. Cro.* 409 & 412.

Adminiſtration during minority of executor ceaſeth at ſeventeen. *Pigot* v. *Gaſcoyn*. *Hil.* 40 *Eliz. Cro.* 603.

Adminiſtrator during minority of executor hath but a ſpecial property, and cannot ſell goods, unleſs they be *bona peritura*, or for neceſſity for payment of debts. *Price* v. *Simpſon*. *M.* 41 & 42 *Eliz. C. B. Cro.* 719.

Adminiſtration granted to a ſtranger is repealed by adminiſtration granted to next of kin; but the *meſne* acts are good. *Blackborough* v. *Davies*. *T.* 13 *W.* 3. 1 Lord *Raymond*, 685.

Adminiſtrator *de ſon tort* liable to lawful adminiſtrator on action of money had and received, waiving the *tort*. *M.* 4 *Anne*. Lord *Raymond*, 1217.

Mandamus to commit adminiſtration. *T.* 9 *G.* 3. *Br. Str.* 552.

Lies not for adminiſtrator *durante minore ætate*. *Hil.* 4 *G.* 2. *Smith's* caſe. *Str.* 892.

Adminiſtration ſhall relate for ſome purpoſes to the death of the teſtator; but this fictitious relation ſhall deveſt a *meſne* right in a ſtranger. *Waring* v. *Dewberry*. *T.* 4 *G. Str.* 97.

Baron ſhall have adminiſtration though the *feme* have a power to make a will. *Rex* v. *Betteſworth*. *Hil.* 4 *G.* 2. *Str.* 891. But this ſeems to be underſtood where the power is partial, that *pro tanto*, as is not within the power, the huſband ſhall have adminiſtration; where he has given her power under which ſhe may diſpoſe her whole intereſt, and ſhe does it, it is otherwiſe. Vide 2 *Str. T.* 12 *G.* 2. *p.* 1111 & 1118.

Againſt adminiſtrator *durante minore ætate*, the ſpiritual court may take bond for duly adminiſtring. *Folkes* v. *Docininique*. 2 *Str. T.* 31 *G.* 2. 1137.

Adminiſtrator, *pendente lite* about a will, may bring actions. *M* 5 *G*. 2. *p*. 917.

Adminiſtration, *pendente lite* may be pleaded *pius darraine* continuance to juſtify a retainer. *Vaughan* v. *Browne*. 2 *Str*. 110 *Hil*. 12 *G*. 2.

Adminiſtrator liable for rent after aſſignment of teſtator's term *Coghill* v. *Freelove*. *M*. 2 *W*. & *M*. 2 *Ventris*, 203.

For a large comment on the ſtatute of *E*. 3. and the nature o adminiſtration, vide *R*. *Edgecomb*, knight of the bath, againſt *Rowland Dee*, adminiſtrator. *Vaughan*'s Rep.

Vide alſo *Dyer*, 256.

And *Plowden*, 275. *Greyſbrooke* v. *Foxe*. And what acts of adminiſtrator *de tort* ſhall bind the executor.

Other caſes relative to adminiſtrators.

Lady *Grandiſon* v. counteſs of *Dover*. 34 *Car*. 2. 3 *Mod*. 2 *S*. *C*. *Skinner*, 155.

Palmer v. *Allicock*. 3 *Mod*. 58.

Newton v. *Richards*. *T*. 6 *W*. & *M*. 4 *Mod*. 296.

Adams v. terretenants of *Savage*. *Paſch*. 3 *An*. 6 *Mod*. 134.

Dorrell v. *Colins*. *T*. 24 *Eliz*. *C*. *B*. *Cro*. 6.

Martin v. *Whipper*. *M*. 30. 1 *Eliz*. *B*. *R*. *Cro*. 114.

Stubbs v. *Rightwiſe*. *T*. 30 *Eliz*. *Cro*. 102.

Atkey v. *Heard*. *Cro*. *Car*. 219.

Skinner, 143.

Petit v. *Smith*. 1 *P*. *W*. 8.

Hook's caſe. *T*. 2 *W*. & *M*. *B*. *R*. *Carthew*, 153.

Rul

Rule on the Sheriff.

WHEN the ſheriff is ruled to bring in the body he has four days, *excluſive* of the day when the rule iſſued, and was ſerved upon the ſheriff.

Vallezjo and Echalai *againſt* Wheeler.

BARRATRY.

On a Policy of Inſurance.

MOTION for a new trial, on a verdict having been found for the plaintiffs, upon the following facts.

In *November* 1772 *Darwin* chartered the ſhip *Thomas and Matthew* of one *Brown*, and agreed by his ſaid charter to *freight her for* Seville, *and back again*.

The plaintiffs and many others ſhipped a *cargo* on board, and *inſured* the ſame.

The inſurance provides againſt loſſes by ſtorms at ſea, &c. and againſt *barratry*.

In the *policy* it is declared that the ſame *ſhall not* be *void* by reaſon of any *flaw* in the veſſel *unknown* to the *aſſured*.

The ſhip ſailed in *December* 1772, and went to *Guernſey*, took in a quantity of brandy, which the captain meant to *run* by way of *clandeſtine trade*; the night following they ſprang a *leak*, which drove them into *Dartmouth*; from whence they went to ——— in *Cornwall*, where the brandy was *ſeized*, by *authority* of the *cuſtom-houſe*.

By the bad weather, &c. the ſhip was rendered *unfit* for the *voyage*, which had been partly proſecuted, after putting into *Cornwall*.

The parties came to an agreement that the *inſurance* ſhould *continue*, and *protect* the *goods* on their *return* to *London*.

The goods were *ſpoilt*, whereupon this action was brought.

The declaration conſiſted of three counts.

Firſt, That the ſhip ſet ſail, and in ſailing ſprung a leak, by th ſtorms and perils of the ſea; whereby the maſter was obliged to repair to *Dartmouth*, to *refit* the ſhip, and then put forth again: An in proceeding and going to the place of deſtination, by ſtorms, an accidents of the ſea, the bowſprit was ſplit, *&c.* and the ſhip in d vers other parts and places damaged, and rendered wholly unfit t purſue her voyage; by which ſtorms, *&c.* and by which accident *&c.* the goods were *ſpoilt*.

Second count, That the ſhip ſprung a leak in her voyage fro *Dartmouth*, *&c.* whereby the goods were *ſpoilt*.

Third count, That by the fraud and *barratry* of the maſter th goods were deſtroyed, and rendered uſeleſs, and of no value.

The *underwriters* contended, that this damage was occaſioned b a *ſimple deviation* of the captain; *not fraudulent*, as *againſt* the *owner* of the *goods*; and was neither *merely accidental*, nor *barratry*, being no fraud againſt the owners.

The *inſured* inſiſted that either it was an accidental loſs, and the they were entitled to recover, under the *general* terms of the inſurance againſt *loſs* at *ſea*, by *ſtorms*, *&c.* or elſe it was *barratry*.

The jury, at the trial, had found (under the direction of Mr Juſtice *Aſhburſt*) that the voyage of the captain to *Guernſey*, wher he took in the *brandy*, was *with the privity* of *Wills*, who was th owner of the hulk of the veſſel, *but without the privity* of *Darwin* who was, under the *charter-party*, the *owner*.

And they found a *verdict* for the *plaintiffs*.

And now, upon a motion for a *new trial*, cauſe was ſhewn againſ the rule by Mr. *Alleyne*.

This caſe was argued more than once, namely, in this term and in Michaelmas term; but I have endeavoured to throw the ſubſtance of both arguments together.

He began his argument by obſerving that *Barratry* was a word hitherto not preciſely defined in our law, or at leaſt not *familiarize* by experience: But that it was apparent, from the caſe in *Strange* that it was far from true that *barratry* was *confined* to ſome act o *fraud*, or injury done *malo animo immediately againſt the* owners for that any fraudulent act, whereby, directly or conſequentially, th owners received damage, would be *barratry* within the terms of th inſurance, though there might be no *ſpecial malice* againſt them.

In *Knight* v. *Cambridge*, *E.* 10 *G. B. R. Str.* 581. Inſuranc againſt *barratry*, *breach aſſigned*, a loſs *per fraudem et negligentiam* of the maſter. Judgment for plaintiff in *C. B.* and general errors aſſigned.

Objected in argument on error, that *fraud* and *negligence* is a general charge, and not ſufficiently *preciſe* to be within the terms of the inſurance providing againſt *barratry.*

Per curiam—The *negligence* certainly is *not*, but the *fraud* is *barratry*; is of a *general* ſignification, and not confined barely to running away with the ſhip. It comes from *barat*, which ſignifies *fraus et dolus*, and extends to *any* fraud of the maſter. The end of *inſuring* is to be *ſafe in all events*, and it would be very pernicious if we were making loop-holes to get out of theſe policies.

This caſe, then, is an authority in point; and upon ſolemn conſideration that *fraud* is *barratry.* The caſe of *Stamma* v. *Brown*, 2 *Str.* 1153, applies the principle yet more *particularly* and *directly* to the caſe now before the court.

That caſe was *thus*: The ſhip the *Gothic Lion* being advertiſed going to *Marſeilles*, *goods* were ſhipped on board her on behalf of the plaintiff, and a bill of lading ſigned by the maſter, whereby he undertakes to go *a droite route a Marſeilles*, and the defendant underwrote a policy from *Falmouth* (where the goods were taken in) to *Marſeilles*: Before the ſhip departed from the port of *London* another advertiſement was publiſhed for goods to *Genoa*, *Leghorn*, and *Naples*, and the plaintiff's agent was told it was intended to go to thoſe ports firſt, and come back to *Marſeilles*; but he (the plaintiff) inſiſted that his bargain was to go firſt or *directly* to *Marſeilles*, and that he would not conſent to let her paſs by *Marſeilles*, or alter his inſurance.

The ſhip, notwithſtanding, did paſs *by Marſeilles*, and, *after* delivering her cargo at the other ports, ſet out on her return with the plaintiff's goods; but, in her voyage thither, was blown up, in an engagement with a *Spaniſh* ſhip. And, in an action upon the policy, the breach was aſſigned for a loſs by the *barratry* of the maſter. And the plaintiff inſiſted, that *any* fraud or *malverſation* was *barratry*; and *Dufreſne* is there quoted. And the reporter ſets down (as referred to) *Florio's Italian* dictionary, title *Barrataria Minſhew & Furetier.* And by the *&c.* which he adds, it appears, that other books were quoted. As to ſome, which I think pertinent to this cauſe, I mean to deſire the favour of the court preſently, and to ſubmit them to their judgment.

The defendants counſel inſiſted this was only a *deviation*; for that it could not be a *crime* in the maſter, who was acting all the while for the benefit of the owners.

The chief juſtice, who was Sir *William Lee*, in his direction t the jury told them that this being againſt the expreſs agreement t go firſt to *Marſeilles*, ſeemed to be more than a *common* deviation being a formed deſign to deceive the contractor: Then he ſubjoin what immediately and moſt forcibly applies to this caſe, and compares it to the caſe of a *ſhip ſailing out of port without paying dutie* whereby the ſhip was ſubject to *forfeiture*, and which, it is added has been held to be *barratry*.

The jury ſtaying out ſome time and aſking the chief juſtice whether it would be barratry, if the maſter was to have no benefit fo *himſelf* by paſſing by *Marſeilles*, and went only to the other place firſt for the benefit of the owners, the chief juſtice anſwered, no And they found for the defendant.

On a motion for a new trial the verdict was confirmed.

It is needleſs to inſiſt on the agreement between the caſes. Tha would have been *barratry* if done for the *private benefit*, of the maſter; this is done for his private benefit, and for the benefit of n other of the parties concerned: The plaintiff was *there* informed o the intention; here it was kept from him and is of itſelf a *ſecret* *clandeſtine fraudulent* action: There the deviation was for the *benefi* of the *owners*; here it is to the prejudice of *Darwin* who is *owne* for the voyage.

Though I ſhould think the caſe ſufficiently eſtabliſhed from theſ authorities, and its own reaſon and clearneſs, yet, as *mercantile* law is a part of the law of nations, your Lordſhips will receive the evidence of that law, and be guided by it in your deciſions: And ſinc this word *barratry* does not ſeem hitherto generally underſtood, i may not be improper to examine what the language and uſage o other commercial nations ſays, in confirmation of thoſe authoritie of our own already cited.

And firſt I will begin with *foreign* books; next I mean, to ſubmit to the conſideration of the court *foreign ordinances*.

Deniſart, in his collection of *new* deciſions upon this word, [*] ſay
" this word ſignifies *malverſation* or deceit by a captain or maſter o
" a merchant veſſel, in what concerns the quality or quantity o
" the merchandizes."

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[*] Ce mot ſignifie *malverſation* et tromperie par un captain on patron de navi marchand, dans ce que a rapport á la qualité et á la quantité des merchandizes voyez ſur ce la un arrêt du 6 Sept. 1689. au journal des audiences. Deniſart collection des deciſions nouvelles ſur ce mot.

The definition is general—*malverſation* or deceit, though the inſtance is particular, as being one of the moſt common and obvious; and he refers for the ſenſe he gives to a decree of the 6th of *Sept.* 1689, in the journal of audiences.

The next author I ſhall take leave, under the indulgence of the court, to cite is *Ferriere*, † who in his dictionary ſays " *barratry*, " in marine language, is a *deceit* of *malverſation* committed by a " captain or maſter of a veſſel to cauſe, or *cauſing thoſe to loſe their* " *merchandize* to whom it belongs."

For example, to *load a veſſel* during the couſe of the voyage is the crime of barratry, and is puniſhable. See " the decree."

He puts this then as an example and one inſtance of many; and if this be a crime (the crime of barratry) and puniſhable, how much more to go out of the way to load a veſſel with prohibited goods, which is a *double* offence; an offence againſt public law and private contract, and ſubjects the owner of the goods to a *double* riſque.

The author whom I ſhall beg leave to cite next is *Savary*,‡ who ſays " barratry of the maſter, in the language of commerce and " merchandize, means the larcinies diſguiſing and alteration of merchandizes which the maſter *or crew* may occaſion; and *generally* " *all kinds of cheating, tricks and malverſations*, which they often " employ to deceive the merchant, freighter and others who are intereſted in the veſſel."

Molloy conſiders barratry as affecting the goods on board only by thefts; but this is evidently a ſhort deſcription, and not to the extent of the crime; as appears from the other authorities cited, and thoſe which remain to be cited.

Mortimer ſays, " it is running away with the ſhip, ſinking her, deſerting her; or embezzling the cargo.

Of theſe ſeveral definitions ſome are leſs exact, others more; ſome more general, others defective: But they all ſhew barratry to be a crime, and ſome of the moſt conſiderable ſeem to prove tha is a crime of *any* ſort of deceit or *malpractice*, *injurious* to the o ners of goods in the veſſel.

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† Barratrie en terme du marine eſt une tromperie ou une malverſation qui ſe commet par patron ou le capitaine d'un vaiſſeau *pour faire perdre les merchandizes* a ceux á qui elles appertiennent.

Par exemple, de charger un barque pendant le cours de la navigation eſt une *crime de barratrie* qui eſt puniſſable. Voyez l' Arrêt.

‡ *Barratrie* de patron en terme de commerce et merchandize veut dire les larcins, les diguiſemens, et alterations des merchandizes que peuvent cauſer le maître et l' equipage d'un vaiſſeau; et *generalement*, *toutes les ſupercheries et malverſations* quils' mettent ſouvent en uſage, pour tromper le merchand chargeur et autres qui ont interêſt au vaiſſeau.

I next would deſire the permiſſion of the court to proceed to t ſtill more important and convincing evidence from the ordinance

And firſt, the celebrated ordinance of *Lewis* the fourteenth, pa 254. art. 28. defines it thus—

" The deceit or malverſation of the maſter in the voyage, or
" port and harbours; alſo the diſguiſings and alterations cauſed
" the maſter or by the crew."*

The ordinance itſelf ſays, the aſſurers ſhall not be anſwerable f damages by the fault of the maſter or mariners, unleſs they be a ſwerable for the *barratry*.

If therefore they inſure againſt barratry, they inſure againſt t *fault* of the maſter; and can it be queſtioned, whether this condu of the captain in the caſe now before the court be or be not a *faul*

And the commentator in his notes deſcribes *barratry* to be *kn* *very* and deceit.†

Ordinances of *Antwerp*, No. 4. No barratry to be inſured again (perhaps that greater care might be taken in the choice of the ma ter.)

Ordinances of *Spain*, No. 42. Agree with thoſe of *France*.

Ordinances of *Genoa*, 1610, refer to a particular code of laws *criminal* ſtatutes.

Ordinances of *Rotterdam*, No. 43. 1721, diſtinguiſh betwee neglect and barratry; ſo that every wilful fraudulent act whereb damage inſues, ſeems to be within the meaning of theſe ordinance as contradiſtinguiſhed to neglect, whether the injury were intende againſt thoſe who ſuffer by it or not.

Ibid. 52. When a captain, without neceſſity, and without any or ders from the aſſured, hath altered his voyage, or run into or touche at any port or road, the inſurance to remain in force.

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* Tromperie et malverſation du maitre dans les routes, portes, et havres; en ſemble les larcins, les deguiſemens, et alterations cauſés par le maitre ou p l' equipage.

† Roceus in notis, barratria, ribalderia et fraudes.

Ordinances of *Hamburg*, No. 6. 1731, deſerve particularly to be conſidered.

Ordinances of *Stockholm* 1750, agree with the ordinances of *Rotterdam*, No. 52.

Ordinances of *Copenhagen*, No. 38. *diſtinguiſh* between *barratry* and neglect.

Ordinances of *Bilboa* 1738, No. 19. Mention barratry as a thing known.

Mr. *Alleyne* cited two other common law caſes.

Elton and *Brogden*, 2 *Str*. 1264, where the ſhip being run away with, but not with an *intent* to defraud the owners, it was held not *barratry*: But then it was by the violence of the crew who forced him back, notwithſtanding he told them the orders: Which therefore as is obſerved there, fell within the excuſe of neceſſity, which has always been allowed. But this proves ſtill farther, that barratry is a crime, and if it be a crime, he who commits it, muſt anſwer for the conſequences; though a different miſchief was produced, and to different parties from what he intended;* eſpecially when the probability of miſchief to the owners of the goods, from this fraudulent departure, and taking of prohibited goods on board with their's, was ſo obvious in a double view.

Vide Hales Pl. of the Crown, title Homicide, where a man intending one unlawful act, is chargeable for another conſequentially: and Bacon's law tracts.

Lewin and *Swaſſo*, *Partr*. 147. by Lord *Hardwicke*. *Barratry* is an act of *wrong* done to the ſhip. Now, I think, it cannot be doubted, that this *unlawful* act of the captain, without the privity and againſt the intereſts of the freightor, and againſt his contract, was an act of wrong, and a wrong to the goods ſo endangered by it and afterwards loſt: And he can not be at liberty to ſay that otherwiſe they would have been loſt. And it is no excuſe to him even if he could, when he has willfully and fraudulently taken the riſque of loſing them thus, and expoſed them by his unlawful act, and in breach of the faith of his agreement, to deſtruction.

Upon the whole, both from our own caſes and from the concurrent teſtimony of writers and public acts of other countries, I hope, I am warranted in ſubmitting to your Lordſhip theſe two obſervations:

Firſt, That any offence againſt the laws of a country whereby the veſſel or cargo may be ſubjected to a condemnation, is *barratry*.

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* In criminalibus ſufficit generalis malitia cum facto paris gradus.

Secondly, Any injury done to the veſſel or cargo, with a dire
intention to defraud the owners.

I think it is beyond controverſy, that the captain of the veſſel i
this caſe falls under the firſt of theſe deſcriptions; and that there
fore the inſurers are liable under the clauſe in the policy which in
ſures againſt barratry, and that the verdict was well given for th
plaintiffs, and of courſe that the court will diſcharge this motio
for a new trial.

On the part of the motion it was urged by Mr. *Buller.*

I ſubmit, that nothing done by the captain in this caſe could b
barratry, unleſs the deviation was without the knowledge of the own
er; for he is not charged with running away with the *goods* or ſhip
burning or deſtroying them, or any direct injury to the goods, o
any malice to the owners of them.

And upon the deviation, if the plaintiff chooſes he may reſort t
an action, and recover againſt thoſe from whom he may be entitle
to recover; but *not* for *barratry.*

The court in the caſe in *Strange* ſays, to make it *barratry*, ther
muſt be ſomething of *criminal* conduct and not merely a breach o
contract.

Where the maſter was by force obliged to deſiſt from his voyag
the plaintiff's counſel would have made barratry of it, but the cou
would not ſuffer it as it was no act of intention to defraud the own
ers; here whoever is conſidered as the owner, there is no act don
by the captain with an intention to defraud him: And as to the at
tempt of conſidering this as criminal, becauſe of the unlawful pur
poſe of the deviation, it being to take in prohibited goods, it is no
thing to the owners; I don't underſtand that it was proved; but i
it were it is not criminal *quoad* the *owners of the goods.*

In *Poſtlethwaite*'s Dictionary of trade and commerce, which I un
derſtand to be generally eſteemed one of the beſt books upon th
ſubject, by gentlemen converſant in mercantile tranſactions, *barra
try* is defined to be *cheating* the owners or *inſurers*, whether by run
ning away with the ſhip, ſinking it, deſerting her, or embezzlin
the goods; all clear, direct, *poſitive* acts of expreſs malice and pre
judice to the owners; this is a conjectural conſequential damage wit
no malice to the owners under any pretence.

But farther with regard to the ownerſhip, I ſhall beg leave t
contend that *Willes* was the owner and not *Darwin*, any more tha
a ma

a man who ſends parcels by a ſtage-coach is the owner of the coach, and *Darwin* only freighted the veſſel for that voyage. And it is found expreſsly with the jury that the deviation was with the privity of *Willes*: If ſo it can not be barratry; for none can charge barratry but the owner, and he by his privity and aſſent waives the charge.

The diſpute in the caſe of *Knight* and *Cambridge*, was whether it was neceſſary to uſe the *technical* word barratry, for the fact was a *total loſs* of the *ſhip* laid to have happened by the fraud and negligence of the maſter: And there can be no diſpute that ſuch an act of *direct* injury to the perſons intereſted in the veſſel would be barratry; but there is nothing like it in this caſe.

And upon the queſtion put in the caſe of *Strange*, whether it would be barratry if the maſter went out of the road by the deſire and for the benefit of the owners? The chief juſtice anſwers *no*; and the jury find their verdict accordingly. Here the jury have found that the deviation was with the privity of *Willes* the owner; and if it were neceſſary, which after this it is not, it might be no difficulty to prove that it was for his *benefit*.

As to negligence being barratry, the caſe in *Strange* is otherwiſe, at leaſt it muſt be *craſſa negligentia* ſuch as infers malice, and of this enough has been ſaid already. As to going out without payment of port duties, that is an act which from the beginning openly abandons the goods and ſhews an original deſign of fraud; not ſo a ſubſequent accidental deviation though it may be for an illicit purpoſe.

I muſt object as to the ordinances of *Stockholm*; they are matter of *poſitive* municipal law of a foreign country, and ought not to bind the deciſions of this court.

Lord *Manſfield*—It is very proper by way of *expoſition* of the general law and cuſtom of merchants. *Colbert*'s edict of 81. has been quoted an hundred times: And this ordinance goes as part of the *general maritime law*, which is a branch of the law of nations.

Mr. *Buller* continued—Barratry muſt be, as the ſeveral writers have defined it, a poſitive direct fraud to the owners, either by deſtroying or abandoning the ſhips or embezzling the goods; this is none of theſe, and therefore not barratry, and with this agree the ordinances of *Middleburgh*, *Amſterdam*, *Schoninberg*, *Hamburgh*, *Florence*, and *Rouen*. Another point Mr. *Buller* endeavoured to ſupport, that they have laid it as barratry or a loſs by fraud of the maſter; and in another count accidental loſs by ſtorms of the ſea: And that this was repugnant, and therefore they ſhould recover on neither.

Lord *Mansfield*—It is a caſe that has *rarely* happened: I have n
that I remember, had a caſe before me of *barratry*. I have gr
doubts of it: It is odd that the inſurers (a third perſon) ſhould
ſure the *owners* againſt the act of their *own* officer whom they the
ſelves appoint.

A good deal depends upon the nature of the agreement by t
charter party; whether it is an agreement between the owners a
freighters that the ſhip ſhall go to a particular place, or whether
is a letting of the ſhip to the freighters.

As to barratry it is agreed by all the books that it *muſt* ariſe *ex d*
licto; but they do not agree as to the nature of the offence: It
ſettled that every deviation is not barratry. It ſeems that barrat
ſhould be a loſs of the ſhip or goods by any *crime*, *negligence* or *d*
viation of the maſter directly injurious to the owner, and *malo ani*
as againſt him, whether it extend farther to conſequential damag
and ſuch as are not even *clearly* and *directly* conſequential, but as
were *collaterally* emerging, and caſually and remotely incidental, u
certain whether they would or would not have happened otherwi
whether this be barratry may be matter of farther conſideration.

It is agreed, that if a ſhip goes out without paying port duti
and is ſeized, this is *barratry*.

I ſhould pay great reſpect to the gentlemen of the *ſpecial ju*
who were conſiderable *merchants*, the proper judges of a cauſe
this nature.

If the ſhip had been ſeized at *Guernſey*, this would certainly ha
been *barratry*.

I don't ſee it is ſhewn *who* is the *owner*. As to the aſſignment
the third count, I think you might have recovered if it had *not* be
barratry, [upon the other counts without.]

Let it ſtand over.

CURIA ADVISARE VULT.

Afterwards on the laſt day of the term Lord *Mansfield* threw o
ſome hints, on points material in the cauſe, to this effect.

We have thought of this caſe: I have never met with it in m
time.

The definition of barratry ſeems to be very *looſe*. It is pret
extraordinary the inſurer ſhould inſure to the owner for the behav
our of a man put in by himſelf.

Th

Thus much however, I think, appears of barratry; it ſeems to be held that it muſt be a crime.

It is to be conſidered whether the *loſs* muſt not happen at the *time* of the *barratry*.

There was great ſtreſs laid on *Willes*'s *knowing* it; and to be ſure, if *Willes* be the owner, with *great reaſon*; for if the *owner* inſures, he *cannot* recover againſt his *own* order or conſent.

But it is material, when a ſhip is let to *freight*, whether the owners of the goods have not the *direction*; if it be let as an houſe to the *freighter*, then he, the freighter, is *owner*.

If on the other hand it is only a *covenant* between them that the ſhip ſhall go that voyage *for* the freighter, then it is only like an *hackney*-coach or ſtage-waggon; and the freighter has only the *uſe* for his goods; *not* the direction.

There appears *nothing* clear from the opinion of *Stamma* and *Brown* but this—that *not every* breach of contract is barratry.

Not every *deviation* is *barratry:* If there is fraud it is ſaid it will be barratry, and it muſt be it is ſaid *ex delicto* and ſo much appears clear.

But is every offence, is every loſs ſome way or other reſulting *ex delicto*, whether *direct* or *remotely conſequential*, whether *neceſſarily* or *probably*, or *poſſibly* occaſioned by the offence, or *uncertain* whether occaſioned by it or *not*, barratry? I think one ground muſt be *ex delicto*, but whether ſuch offence as would ſubject a man to a criminal proſecution, as running away with the ſhip, deſtroying the goods or the like, may be a queſtion.

And ſo it may what kind of loſs, and how far a loſs not direct but conſequential, and what ſhall be held a conſequential loſs to this purpoſe.

Where a deviation was made there is an *authority*, that going quite out of *courſe* and *delaying* is *not barratry*.

That caſe of *Stamma* and *Brown* was very accurately, it ſeems almoſt *verbatim*, taken by my brother *Willes*.

To order a new trial till we have ſettled our opinions with regard to the law would be quite nugatory.

Of the ordinances, that which ſpeaks moſt ſenſibly is the ordinance of *Florence*, I believe, which ſays no ſuch inſurance ſhall b made.

A crime with reſpect to the owner of the goods, it is clearly hel it needs not be. For if the ſhip go out of the port *without paymen of duties* and is taken, this is barratry. The only queſtion ſeems t be whether the damages muſt be direct or conſequential.

CURIA ULTERIUS ADVISARE VULT.

Afterwards, on *Thurſday Nov.* the 10th, in *Michaelmas* term Lord *Mansfield* delivered the judgment of the court to the followin effect:

This caſe has been for ſome time for the conſideration of th court. We are agreed in our opinions. I will firſt ſtate the caſe You will attend, becauſe I have not got the report, but only a ſhor note, for fear I ſhould omit any material circumſtances.

This is an action on a policy of inſurance upon a voyage fro *London* to *Seville*, which policy undertakes againſt *barratry*; th ſhip was to take in goods for any perſons in the way of *genera freightage*.

The ſhip belonged to *Willes* as *owner* of the *hulk*, but was chartered by *Darwin* for that particular voyage; and without the knowledge of *Darwin* went to *Guernſey*, and *there* took in *brandy in evaſion* of the duties. Thence fell into a ſtorm, was much damaged and driven back to *Dartmouth*, thence refitted and went on upo the voyage, but in going was ſo much farther damaged as to be incapable of continuing her courſe, and obliged to put in at *Helfor* This ſhip was not confiſcated on account of the *contraband* good In *conſequence* of the damage the ſhip ſuffered the *goods* were *ſpoil* The plaintiffs brought this action to recover on the policy again the underwriters, for the *loſs* of the goods *ſo happening* as is ſtate and the terms of the inſurance being as is already ſtated. The ju found a *verdict*, under the directions of the judge, for the plaintiffs—and they find (as above ſtated) that the voyage to *Guernſ* for the purpoſes already mentioned, was *with the knowledge* of *Willes* but without the knowledge of *Darwin*.

Upon this a *new trial* has been moved, and the *general queſtion* i whether this act of the captain in going the ſmuggling voyage, an taking in the brandy as above ſtated, be or be not *barratry*, ſo as t entitle the plaintiffs to recover.

On the trial the defendants contended this was not a deviation, becauſe it was a *new voyage:* So far they were right; but it was contended by the plaintiffs that it was *barratry*; becauſe a voyage *againſt orders* for an *illegal purpoſe*, whereby the goods were expoſed to danger, and were afterwards actually *ſpoilt*.

Much ſtreſs was laid upon the trial, that if with the conſent of *Willes* it *could not be barratry*; becauſe barratry could not be when with the *conſent* of the owner.

To be ſure when the owner *orders* or *conſents* to any thing, he cannot recover againſt his own order or conſent given for what has been done.

And this, as it is true in the *principle*, would have been very true in the application, if *Willes* had been at all concerned in the caſe.

I believe it has *never* been decided with *accuracy* what *barratry* is, in *England*; and as in all mercantile tranſactions I have held *certainty* of greater conſequence than perhaps upon what rule *originally* the caſe was decided. I think *general verdicts* are not to be regarded, as certainty is never to be had from them, it not appearing on what grounds the jury found. And in general, notes of caſes taken at *niſi prius*, though ever ſo well taken, and decided by judges of ever ſo high authority, are liable to the ſame objection for ſimilar reaſons.

In *Pole* and *Fitzgerald*, it may be ſeen how much the different reaſons given as the ground of the judgment, in caſes of general verdict, tend to exclude certainty from caſes of that nature.

Of the common law caſes which merit conſideration upon this head, there are however *Knight* and *Cambridge*, where it was held that one act of barratry, was going out without payment of port duties. And the court ſays that *barratry* is of a general ſignification, and not confined to running away with the ſhip; that it ſignifies *fraus* and *dolus*, and extends to *any fraud* of the maſter; that the end of inſuring is to be *ſafe* in *all* events.

Stamma and *Brown*, the caſe from the queſtion there put, and the anſwer by the chief juſtice appears very much to the preſent caſe.—The veſſel was to go ſtraight to *Marſeilles*, and it goes out of the way ſeemingly on a formed deſign, ſomewhere, to cheat the contractor in the voyage. He ſays this is not *ſimply* a deviation but ſomewhat *more*. The jury aſk whether if it were for the advantage of the *owner*, and not his own, this was *barratry*. The chief juſtice tells them no; they find for the defendant: And upon a motion for a new trial it is refuſed, becauſe it appeared the maſter acted co ſiſtent with his duty to the *owners,* and the plaintiff's agent *knew* the intended alteration; and to make it *barratry* there muſt ſomething *criminal.*

I don't think either of theſe caſes ſtrong enough to fix the boun of what is, or is not *barratry.*

The laſt caſe is *Elton* and *Brogden.* There the ſhip went out wi letters of marque *inſured* by the defendant. In her voyage ſh took a prize and returned to *Briſtol,* and received her proportio able part of the premium. Then another policy was made; ſh ſailed again with *expreſs orders* from the *owners,* that, in caſe of taking another prize, they ſhould put ſome hands on board the ſa prize, and ſend her to *Briſtol*; but the ſhip in queſtion ſhould co tinue her voyage with the merchants goods. Another prize w taken, and the captain gave orders to ſome of the crew to carr the prize to *Briſtol,* and deſigned to go to *Newfoundland*; but th crew oppoſed and inſiſted he ſhould go back, though he alledge his orders; and they *forced* him out of the way whereby his ow ſhip was taken, but the prize got ſafe.

On action brought againſt the inſurers, it was contended this wa ſuch a deviation as diſcharged them; but the objection made to thi is, that here was a *force* upon the maſter ſuch as he could not re ſiſt: But the anſwer is, the inſurance is againſt the *crew* as well a the maſter. I think the more probable ground is, that, as this wa a veſſel upon a *privateering voyage,* it was neceſſary they ſhould tak care of the *prize* when they had taken it, and the crew exerciſe *their* judgment for the *benefit* of the ſhip.

I come now to the caſe before the court; which being materia and as it appeared to me a *new* one I left it for argument; and it ha been very ably argued.

As it was a matter of a *commercial* nature, and turned greatly upo the *uſage* and *cuſtom* of merchants, I conſulted an eminent merchant of whoſe *ſkill* and *experience* I have great opinion.*

I do not find the meaning of the word has been ſettled in thi country. The books and ordinances of other nations were ver properly quoted to come at the underſtanding of their uſe of th word.

The *Italians* were the *firſt* great trading nation who introduce the word. *Baratrare* in the *Italian* dictionaries ſignifies *to cheat, de*

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* Cuilibet in arte ſua eſt credendum.

fraud, or *trick*; and this ſeems to have been the general acceptation of the word in other trading nations, who have borrowed the term from thence.

Yet undoubtedly, where the caſe is of the *owner* of the ſhip *conſenting*, he cannot recover for what was done by his knowledge and *conſent*. But in this caſe *Willes*, the general owner, has nothing to do with it: *Darwin engages*; *puts* the *goods* on board; it was againſt the conſent of the *owner*, for this purpoſe, if what was done was againſt the conſent of *Darwin*.

What is done? The ſhip is to ſet out from *London* to *Seville*; *Darwin relies* upon this; and truſts that the voyage will be immediate, as on the faith of the inſurance he had reaſon. The maſter, inſtead of going directly to *Seville*, goes upon an *iniquitous* voyage by which the ſhip was liable to be *confiſcated*: This is the deceit upon *Darwin*; and the goods, after this *fraudulent* departure from the courſe of the voyage, the ſhip falling into a ſtorm, are *ſpoiled*.

And whether the *damages* happened *directly* or *not*, *does not ſignify*; nor whether it was an act of *immediate intentional* injury againſt the owner of the goods.

If the maſter *runs away with the ſhip* this is *barratry*, and though the ſhip afterwards *returns* and purſues the voyage it is *ſtill barratry*, and the perſon who by ſo *offending* was *once liable*, *continues liable as to all conſequential* damages.

Here I think the damage ſufficiently appears, and upon the general principle falls within the rule of conſequential damage, as it *might* not have happened but for the *illicit voyage*; and whether it would have happened or not, if the ſhip had continued in its ſtraight courſe, is not material.

And in *this* caſe there is *great* reaſon. *Darwin* has inſured; he *loſes* by the deviation; the deviation is the *voluntary*, *illegal*, *fraudulent* act of the captain; and therefore it appears to me *extremely* clear, that this *ſmuggling* voyage was *barratry* in the maſter, and *conſequently* comes within the terms of the *inſurance*; and of courſe that the *verdict* is right, and that there ought *not* to be *a new trial*.

Mr. Juſtice *Aſton*—One would wonder, when this word was in uſe *two hundred years* ago, that there ſhould remain *now* any doubt what *barratry* is.

I think it has *always* been the ſame in *idea* and *general* meaning, though differing in *terms*, and not ſettled in *practice*—*deceit*, *villainy*, *knavery*, *fraud*.

In *Florence* it is ſo explained near *two hundred* years ago, “ *D*
“ *barratriâ et contrabandâ venditione.*”

Where the maſter is acting *not* for his *own* advantage, but for th *benefit* or with the *conſent* of the *owners*, it appears, by the caſe i *Strange*, this is not *barratry* for them to charge him with the loſs.

But who in this caſe is the *owner?* *Verbally*, *Wills*, the owner o the hulk of the ſhip; but *really*, as far as this queſtion is concerned he has *nothing* to do with it; the owner is *Darwin*. I think th *jury* did *very right* in conſidering *Darwin* as *owner*, *pro hâc vice.**

This is *without* the *knowledge*, then, of the *owner*: It is *not* fo his *benefit*, but to the *danger* of the goods, and for an *illicit* purpoſe.

And it would not ſignify whether the ſhip was *ſafe* or no from *that* voyage. There is no ſaying when the miſchief happened to th veſſel which occaſioned the loſs.

I think this is *one* of the caſes where the underwriter is liable fo the act of the maſter; being a *criminal* act. And the caſe of *Knight* and *Cambridge* ſpeaks of *any* criminal act, deceit, or fraud; ſo does *Stamma* and *Brown*.

Though this may not be within the ſtatute of G. 3. [*qu.* the ſtatute alluded to] it is at leaſt a deviation for an illegal purpoſe, which, I think, is ſufficient to make it *barratry*, (being without conſent o the *temporary* owner) and the inſurers liable to anſwer the *conſequential* loſs, though not *directly* or *neceſſarily* conſequential on the deviation.

Mr. Juſtice *Willes*—I think this is *barratry*. *Darwin* was the *freightor*: I think it's being done *without* the *privity* of the freightor is the *ſame* as if *done without* the *privity* of the *owner*.

The only queſtion that occurred to me was, whether this was a loſs *by* the *act* of *barratry*: For the three common law caſes ſeem to ſay that the loſs *muſt* happen by the act of *barratry*.

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* Thus, a man who draws a bill of exchange is a merchant, *pro iſta vice*, v. *Green*'s Bankrupt Laws, *c.* 1. and the caſes there cited. 1 *Salk.* 125. *Hodges* v. *Steward*. *Paſch.* 3d *W.* & *M.* 2 *Ventr.* 295. 1 *W.* & *M.* *Sarsfield* v. *Witherley*. And 2 *Ventr.* 310. *Cramlington* v. *Evans and Purceval*, 1ſt point on error in *Scaccario*.

There is no ſaying here *when* ſhe might ſuſtain that loſs. By going out of the way ſhe fell into a ſtorm, which ſhe *might* have *eſcaped* if ſhe had not gone to *Guernſey*, as Mr. *Alleyne* very properly obſerved. And this, *after* a *verdict*, the *court* may take as *probable*, that the loſs *may* have happened by *conſequence* of the voyage.

This is *certainly* a *deviation* without the conſent of the freightor: And *poſſibly* the cauſe of the damage ſuffered; and it is a deviation for a *bad* purpoſe: And in the *juſtice* of the caſe I am *ſatisfied*, whatever I might *doubt*, ſince it does not appear to fall within the caſes. And though it is not a loſs by a *fraudulent intent* of the *maſter* or *mariners*, to hurt or deſtroy, or embezzle or corrupt the goods of the owner, yet the *ſubſtantial* juſtice has been done, and the jury have found a *verdict* which, I think, we ought not to ſet aſide.

Mr. Juſtice *Aſhhurſt*—I am of the ſame opinion as at the trial.

I think they have a right to recover upon *either* count, whether of loſs, ſtorms, and perils of the ſea, or for *barratry* of the maſter.

As to the objection, that the two charges of accident and criminal intent claſh with one another, the party ſhall not ſet up his own fault as a defence;* for if it was not accident it was a criminal deviation, or *barratry*; and it is no anſwer for him to ſay it cannot be both, and therefore it ſhall be neither.

I think there was ſufficient evidence to find it a loſs by ſtorms and perils of the ſea, upon the firſt count, ſuppoſing this to have been not *barratry*.

And farther, I think it was *barratry*, being a *deviation* for an *unlawful act*, and loſs *enſuing*; but even without that, upon the *firſt* ground, I think the verdict good on the firſt count.

[*Note*, There is a caſe where this doctrine of conſequential damages is very curiouſly diſcuſſed, 3 *Wilſ* 403, 13. *Scot* v. *Shepherd*. E. 13 G. 3. Action of treſpaſs and aſſault. Plaintiff declares, that the defendant, on the 28th of *October* 1770, *vi et armis*, made an aſſault upon the plaintiff, by caſting and toſſing a lighted ſquib, whereby he loſt his eye.

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* Nemo lucrabitur ex injuria ſua propria.

This maxim was carried to it's full extent in the famous caſe of *Coke*, who was indicted on the *Coventry* act, and pleaded an intent not to maim but murder; but he was convicted on that act, and executed.

The caſe was, the defendant, on the day laid in the declaratio
at *Milborne Port*, in the county of *Somerſet*, at a fair, which w
then and there held, threw a large ſquib from the ſtreet into t
market-houſe, where a large concourſe of people were aſſemble
and the ſaid ſquib thrown by the defendant fell on the ſtanding *th*
of one *W. Yates*, who was then expoſing to ſale gingerbread, &
and one *James Wills*, inſtantly, to prevent miſchief to himſelf a
to the wares of the ſaid *Yates*, took it up, and threw it acroſs t
ſaid market-houſe, when it fell upon another ſtanding *there* of o
James Ryal, who was alſo expoſing the ſame ſort of wares to ſal
and the ſaid *James*, inſtantly, to ſave himſelf and his good
took up the ſaid lighted ſerpent, and threw it to another part of t
ſaid market-houſe, and, in ſo throwing, ſtruck the plaintiff on t
face *therewith*, and the ſquib burſting, put out one of the plaintiff's ey

The jury found a verdict, with 100*l.* damages, ſubject to t
opinion of the court: Whereupon, on argument in *C. B.* the Lo
Chief Juſtice *De Grey*, and *Nares* and *Gould*, Juſtices, were of op
nion that the action well lay againſt the defendant; for that the *fi*
throwing was the *unlawful violent* act of the defendant, and the ſu
ſequent throwings were *inſtantaneous*, and neceſſary thereupon, an
as it were, *continuando* the firſt; ſo that the whole was one *ſin*
unlawful act of the defendant, by *force*, to the injury of the plai
tiff. And the Chief Juſtice held it to be as if the ſquib had boun
ed and rebounded of itſelf ſeveral times after it was thrown by t
defendant, before it reached to the plaintiff's eye. *Blackſtone*, Ju
tice, *e contra*, that action of treſpaſs lay not, but action on the ca
for *conſequential* damages; the two ſubſequent throwings after the fi
being *independent* acts, giving new directions to the ſquib, and n
proceeding from the defendant, his order or direction, but from t
throwers, as free agents, abſolutely *diverſo intuitu*, for the preſerv
tion of their goods and perſons.

I cannot leave this caſe without acknowledging my obligations
Mr. *Alleyne*, for his very polite and friendly aſſiſtance, in furniſhi
me with his notes of the foreign ordinances to which he referred
his argument; and which notes I have had the pleaſure of uſing
part, as to ſome other branches of the argument, and in a few plac
of the judgment, where my own were defective.]

Anonymous.

Attachment for Non-payment of Coſts in a criminal Suit.

ON a motion for a rule to ſhew cauſe why the defendant ſhou
not be diſcharged out of cuſtody upon the inſolvent debto
act.

Th

The defendant had been indicted at the *Old Bailey* for an aſſault, and had removed the indictment by *certiorari* into this court; and for non-payment of coſts was under an attachment.

V. 21 Ja 1. c. 8. 13 & 14 Car. 2. c. 6. ſ. 16. 22 Car. 2. c. 12. ſ 4. And 5 W. & M. c. 11.

The caſe of *Rex* v. *Stokes*, 23 *G.* 2. was cited, who moved to be diſcharged under the general words of the act of grace, 20 *G.* 2. and it was objected, that there was an *exception* of *contempts*: That was a caſe alſo of an attachment on recognizance for non-payment of coſts. Lord Chief Juſtice *Lee* ſaid it was not a contempt where the rights of the ſubject *only* are concerned, *i. e.* where the form is of a criminal public ſuit or proceſs in the name of the crown, but the ſubſtance a *civil private* remedy. Mr. Juſtice *Wright* quoted a caſe of an attachment upon a recognizance; and Lord Chief Juſtice *Lee* ſaid it was *not* a *contempt* till he was put to anſwer interrogatories; for he might clear himſelf of the contempt, and the *attachment* was only *meſne* proceſs to bring him into court.

Mr. Juſtice *Aſton* appeared to compaſſionate the young man's caſe very much, and ſaid he wiſhed to be able to ſatisfy himſelf that it was in the power of the court to *diſcharge* him: And he thought it a caſe which ought to be interpreted in favour of the liberty of the ſubject.*

Mr. Juſtice *Willes*—He has ſatisfied to the crown by his four month's impriſonment: Suppoſing there was a *general pardon* he could not be diſcharged, for the crown has nothing in it, as it concerns the right between ſubject and ſubject.† And he cannot, it is ſaid, be diſcharged under the Lords act, which is a *cleft ſtick* indeed.

Afterwards, the next day being the laſt of term, after Lord *Mansfield* had left the court, the three other judges delivered their opinions to the following effect:

Mr. Juſtice *Aſton*—I apprehend when the deciſion was made in this court that an attachment was an execution in a civil ſuit; it was not a *new deciſion*, but it was *always ſo*.

Now it does not ſtrike me there is any difference in the *coſts* ‡ upon the civil ſuit. The maſter is to tax, and if not paid within the time an attachment goes. The 9th of *G.* 3. *c.* 26. is, in my opinion, a legal recognition that perſons ſhall be *diſcharged* from *execution* on *whatever* ſuit.

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* Leges Angliæ omnium libertati favent.

† Rex non poteſt gratiam facere cum injuria alterius.

‡ Acceſſorium ſequitur principale.

This ariſes upon an act of parliament, whereby when an indic ment is removed by *certiorari* the defendant muſt enter into a *recog nizance* for the coſts to be taxed by the maſter, and if not paid with in a time limited (ten days) *attachment* iſſues. 5 *W.* & *M. c.* 11 *ſ.* 3.

If an attachment for coſts is an execution, whether the coſts a taxed on the ſide of the maſter of the crown office or on the civ ſide, how is he without diſcharge? And yet if he be not withi the benefit of the Lords act, becauſe it is an attachment at the ſu of the crown, he plainly on the other hand is not within a gener pardon; ſo that it amounts to impriſonment for life.

You can have no more than he has. And I don't ſee, eſpeciall ſince the ſtatute of the 9th of *G.* 3. why he ſhould not be di charged.

Mr. Juſtice *Willes*—*Statutes in favour of the liberty of the ſubje ought to be liberally conſtrued.*

The ſtatute of 9 *G.* 3. diſcharges all perſons in execution und *any* ſuit.

There is an end of all the *criminal* part of the ſuit.

"It is *declared* and enacted" are the words, which ſeems as if t ſtatute meant to extend the benefit in the fulleſt manner.

Therefore I am willing to adopt the *liberal* conſtruction, the pu lic having been ſatisfied by the impriſonment; and eſpecially as othe wiſe this would be the caſe of impriſonment without *probability releaſe*—and of a *minor*.

And whether it has ever come before the court upon motion not, they will give a *liberal* and *beneficial* conſtruction of a ſtatute this nature.

Mr. Juſtice *Aſhhurſt*—It is very ſtrange he ſhould not be d charged becauſe it is a *civil* ſuit, not even by a general pardon, whi is certainly the caſe; and then it ſhould be turned againſt him t it's not a civil ſuit, but a ſuit of the crown, and that ſo the act parliament does not diſcharge him.

CURIA—*Let him be* DISCHARGED on taking the OATH on t INSOLVENT DEBTORS ACT.

Held that attachment for non-payment of coſts, on 5 W. & M. c. 11. on an indictment of aſſault, is diſcharged by the inſolvent act.

4 Eleg

Elegit.

YOU muſt revive *elegit* by *ſcire facias*. If not proceeded upon within the year the writs muſt be without *diſcontinuance*; otherwiſe the court will preſume ſatisfaction.

Bail.

ON a motion to ſet aſide execution againſt bail, with coſts, the principal having been diſcharged by certificate under a commiſſion of bankruptcy.

Mr. *Dunning*—That the motion to ſet aſide execution with coſts muſt infer irregularity; and that there was none in this caſe, and therefore coſts out of the queſtion. That formerly the bail muſt have brought in the principal and *ſurrendered*: That *now*, if they apply *before they are fixed*, they may do this without ſuch form; but they have *not* applied. They ought, *without notice*, to have *watched* whether a *capias ad ſatisfaciendum* was taken out againſt the principal, which of courſe would end in a *ſcire facias* againſt the bail, to charge them.

There is no reaſon any more than there would have been if the certificate had iſſued *ſubſequent* to the fixing of the bail.

Lord *Mansfield*—Why did the plaintiff proceed after he had *notice* of the bankrupt being diſcharged?

On the other ſide, Mr. *Cowper* was going to have argued, but Lord *Mansfield* told him it was not neceſſary.

Lord *Mansfield*—This is a mighty *plain* caſe. The bail are to *watch* the proceedings of the plaintiff, *unleſs* upon the ground of their *knowing* that the plaintiff *knows* that the defendant has *got* his *certificate*. And why, then, does he purſue an *iniquitous* demand againſt the bail?

They knew nothing of the *ſcire facias*. If it were not that they are diſcharged by the event, they muſt take notice of the *ſcire facias* at their *peril*.

Mr. *Dunning* hoped the proceedings would be ſet aſide *without coſts*, as being *regular*.

Lord *Mansfield*—The proceedings are *irregular*, as contrary to *la* and *juſtice*.

Mr. *Dunning*—It is your Lordſhip's opinion, then, that the *cer* *tificate* of a bankrupt is to amount to a diſcharge of bail?

Lord *Mansfield*—Yes; if the plaintiff *knows* of the *certificate*, an *proceeds*.

Rule absolute, however, *without* costs.

But the court deſired it might *not* be taken for a *precedent* of *ex* *cuſing coſts* upon the like application for the future.

Mr. *Dunning* ſaid they had no means of knowing that ſuch a *pro* *ceeding* was not *warrantable*; they had received *no light* in it.

Lord *Mansfield*—They had the light *within* to tell them. The had no need of any other to ſhew that it was *unjuſt* to com upon them by ſurprize, when the defendant was *diſcharged*, and b that means the *bail*; and when this certificate had been *ſued* out year and an half, and the plaintiff had notice.

It was objected by one of the counſel, that, if this was the caſ the *uſual* application, that upon *pleading* to the *ſcire facias* an *exone* *retur* might be entered, would be of no uſe.

Mr. Juſtice *Aſton*—It will not be uſeleſs; as it will ſave them great deal of *expence*, which they otherwiſe may often incur.*

Writ of Error.

ON a motion for a rule to ſhew cauſe why execution ſhould n be taken out againſt *all* the defendants, notwithſtanding a *wr* of *error* brought by *two* of them.

Objection to the motion, that the plaintiff had obtained a *confeſ* *ſion* of damages from three of the defendants in the cauſe, ſuſpecte to be by *colluſion*: That the writ of error *exiſts*, and muſt have it *power* while it ſtands.

If it be an irregular writ, the motion ſhould be for a rule to ſhe cauſe why the writ ſhould not be ſet aſide.

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* Præſtat cautela quam remedium.

Lord *Mansfield* declared he would give *no* directions: They might get rid of the writ of error if they could; if not, that it would be in *force*.

Rule discharged.

Time to plead.

It ſeems declaration delivered before the *Eſſoign* day of the term entitles to a plea within eight days.

Inſpection.

Motion for liberty to inſpect books of a corporation.

Objection, that it was ſo late moved the corporation would not have time to anſwer.

Lord *Mansfield* aſked whether a *cuſtom* was not concerned.

And I think it turned out to be a cuſtom concerning freemen's fees.

Lord *Mansfield*—They *ought* to have *inſpection*.

Rule accordingly.

Witneſs.

Motion to ſtay going to trial, on affidavit that they have been *endeavouring to find a witneſs, and cannot*.

Rule discharged.

Irregularity.

Where bill filed againſt one as attorney of this court who is attorney of the Common Pleas, and *judgment* thereon, this ſeems *error*, and not irregularity.

Writ of Error.

MOTION for execution notwithſtanding a writ of error, o ſuggeſtion that it iſſued *before judgment* ſigned. Wherea the aſſignment of *general error* in writs of error is thus: *Quia in re cordo et proceſſu ac etiam in redditione* JUDICII *manifeſte eſt erratum* and therefore the writ of error could not *anticipate* the judgment.

But it was obſerved the proper way to come at this was by moving to ſet aſide the writ.

And the *maſter* ſaid whoever ſued out a writ of error had it i his pocket to make uſe of when judgment ſhould be ſigned; an the judgment *related* to the firſt day of term. *Q. N.*

Inſpection of Books.

ON a rule to ſhew cauſe why the plaintiff ſhould not inſpec the books of the corporation of the city of *London*, and wh he ſhould not have liberty to take *copies*.

This was an action upon a penal ſtatute of 3 *G*. 3. to prevent perſons voting who are not freemen, and oblige thoſe who have the cuſtody, to produce to the candidates or freemen, the books of th corporation containing admiſſions of freemen.

It was objected, that if the rule were granted in this caſe, the defendants might be made liable by compulſion to *accuſe themſelves.*

To this it was anſwered, that the application is to the defendant not in their *private* and *perſonal*, but in their *political* capacity.

However, it appearing the defendants could not comply with th rule, they not having the power of granting inſpection in themſelve

RULE DISCHARGED.

Michaelmas Term,

14 Geo. 3. 1774. K. B.

The Cauſe of the Iſland of Grenada.

Campbell *v.* Hall.

THIS cauſe came on to trial before the right honourable *William* Lord *Mansfield*, on *Friday* the ſecond of *July*, at the ſittings after *Trinity* term, for the city of *London*, at *Guildhall*, when a ſpecial verdict was found: The proceedings in the cauſe were as follows:

“*Trinity* term, in the 13th year of the reign of King *George* the third.

“*London* to wit, BE IT REMEMBERED, that heretofore, that is to ſay, in *Eaſter* term laſt paſt, before our Lord the King at *Weſtminſter*, came *Alexander Campbell*, Eſq; by *Benjamin Roſewell*, his attorney, and brought in the court of our ſaid Lord the King then there, his BILL againſt *William Hall*, Eſq; being in the cuſtody of the marſhal of the *Marſhalſea* of our ſaid Lord the King, before the King himſelf, of a plea of TRESPASS on the caſe; and there are PLEDGES for the proſecution, to wit, *John Doe* and *Richard Roe*. Which ſaid BILL follows in theſe words, to wit, *London*, to wit, ALEXANDER CAMPBELL, Eſq; complains of WILLIAM HALL, Eſq; being in the cuſtody of the marſhal of the *Marſhalſea* of our Lord the King himſelf, of a plea [of treſpaſs on the caſe; AND ALSO] FOR THAT WHEREAS the ſaid *William*, *on the firſt day of January*, in the *year* of our LORD 1773, at *London* aforeſaid, to wit, in the pariſh of St. *Mary-Le-Bow*, in the ward of *Cheap*, was *indebted* to the ſaid *Alexander* in the ſum of 20 *l.* of lawful money of *Great Britain*, for the like ſum of money by the ſaid *William before* that time *had and received*, for and to the *uſe* of the ſaid *Alexander*: And being ſo *indebted*, he the ſaid *William*, in conſideration thereof, *afterwards*, to wit, on the *ſame* day and year aforeſaid, at *London* aforeſaid, in the pariſh and ward aforeſaid, *undertook*, and to the ſaid *Alexander* then and there

Commencement by bill.

Plea of treſpaſs.

Pledges.

Recital of bill.

Ac etiam.

Indebitatus.

Aſſumpſit.

Breach aſſigned.

Damages. Igitur apponit ſectam.

“ faithfully *promiſed*, that he the ſaid *William* would well and tru
“ *pay* and ſatisfy the ſaid *Alexander* the ſaid ſum of money *whenev*
“ he the ſaid *William* ſhould be thereunto afterwards *required*. Ye
“ the ſaid *William*, not regarding his ſaid promiſe and undertakin
“ but contriving and fraudulently intending craftily and ſubtilly
“ deceive the ſaid *Alexander* in this behalf, HATH NOT PAID t
“ ſaid *Alexander* the ſaid ſum of money, or any part thereof, (a
“ though the ſaid *William* afterwards, to wit, on the ſame day a
“ year aforeſaid, and often afterwards, at *London* aforeſaid, in t
“ pariſh and ward aforeſaid, was by the ſaid *Alexander required*
“ do) *but to pay* the ſame, or any part thereof, to the ſaid *Alexa*
“ *der* he the ſaid *William* hath hitherto altogether *refuſed*, and ſt
“ *doth refuſe*, to the DAMAGE of the ſaid *Alexander* of TWENT
“ POUNDS. *And therefore* he brings his SUIT, &c.”

Continuance.

AND NOW on this day, to wit, on *Friday* next after the morro of the *Holy Trinity*, in this *ſame term*, (to which ſaid day the ſa *William* had leave to *imparle* to the ſaid *bill*, and then to anſwer, & before our Lord the King at *Weſtminſter*, *comes* as well the ſaid *Ale* *ander*, by his *attorney* aforeſaid, as the ſaid *William*, by *Robert Wa* his *attorney*; and the ſaid *William defends* the *wrong* and *inju* When, &c. and *ſays* he *did not* undertake and promiſe in mann and form as the ſaid *Alexander Campbell* above complains agai him. *And* of this he puts himſelf upon the COUNTRY; and t ſaid *Alexander* doth the *like*.

Defendit vim et injuriam.
Plea of non-aſſumpſit.
Defendant ponit ſe ſuper patriam.
Plaintiff ſimiliter iſſue.

Veniat jurata.

Therefore let a jury thereupon *come* before our Lord the King *Wedneſday* next after three weeks of the *Holy Trinity*, by whom t truth of the matter may be better known, [and who neither are kin to the aforeſaid *Alexander* nor to the aforeſaid *William*] to reco nize the truth of the iſſue between the ſaid parties, becauſe as w the ſaid *Alexander* as the ſaid *William*, between whom the iſſue have put themſelves upon the ſaid jury. The ſame day is given the party aforeſaid.

Day of farther appearance.

Reſpite for default of jurors.

Niſi prius.

Afterwards the proceſs being continued between the parties afo ſaid, of the plea aforeſaid, by the jury between them being *reſp* (before our Lord the King, at *Weſtminſter*, until *Saturday* next a the morrow of *All Souls* then next following, UNLESS the Ki right truſty and well beloved *William*, Lord *Mansfield*, his Majeſ Chief Juſtice aſſigned to hold pleas before our Lord the King hi ſelf, ſhall firſt come on *Friday* the ſecond day of *July*, at *Guildhall* of the city of *London*, according to the form of the tute in ſuch caſe made and provided) for *default* of jurors, beca none of them did appear.

Continuance.

At which day, before our Lord the King at *Weſtminſter*, ca the aforeſaid *Alexander Campbell*, by the ſaid *Benjamin Roſewell*,

attor

attorney aforeſaid. And the ſaid Chief Juſtice, before whom iſſue was tried, ſent hither his record had in theſe words, to wit, "Afterwards, that is to ſay, on the day and at the place within contained, before the right honourable *William*, Lord *Mansfield*, the Chief Juſtice within written, *John Way*, gentleman, being aſſociated unto him according to the form of the ſtatute in that caſe made and provided, *comes* as well the within named *Alexander Campbell*, Eſq; by his attorney within named, as the within named *William Hall*, Eſq; by his attorney within mentioned.

Poſtea.

"And the JURORS of the jury within mentioned being *ſummoned*, ſome of them, that is to ſay, *Anthony Highmore*, *Peter Boſtock*, *David Chambers*, *James La Motte*, *John Wilkinſon*, *Joſhua Bedſhaw*, and *Silvanus Grove*, come, and are *ſworn* upon that jury: And becauſe the *reſidue* of the jurors of the ſame jury do not appear, therefore other perſons, of thoſe ſtanding by the court, by the ſheriffs of the city and county aforeſaid, at the requeſt of the ſaid *Alexander*, and by the command of the ſaid Chief Juſtice, are now newly ſet down, whoſe names are filed in the within written panel, according to the form of the ſtatute in that caſe made and provided. Which ſaid jurors, ſo newly ſet down, that is to ſay, *John Lee*, *William Kerſil*, *Charles Hougham*, *John German*, and *Richard Hatt*, being required, come, who, together with the ſaid other jurors before *impanelled*, and ſworn to declare the truth of the within contents, being elected, tried, and ſworn, upon their OATHS ſay,

Names of the jurors.

Tales de circumſtantibus.

"THAT the iſland of GRENADA, in the *Weſt Indies*, was in the poſſeſſion of the *French* king until it was *conquered* by the *Britiſh* arms in 1762. And that DURING that poſſeſſion there were certain CUSTOMS and impoſt DUTIES collected upon GOODS IMPORTED and EXPORTED *into* and *out of* the *ſaid iſland*, under the AUTHORITY of his moſt Chriſtian Majeſty. And that in the ſaid year 1762 the ſaid iſland was conquered by the King of *Great Britain*, then in OPEN WAR with the *French* King: AND that the ſaid iſland of GRENADA SURRENDERED to the *Britiſh* arms upon the SAME ARTICLES of CAPITULATION *as had been before granted* to the inhabitants of the iſland of MARTINICO, upon the SURRENDER thereof to the *Britiſh* arms. And that in the articles of capitulation demanded by and granted to the inhabitants of the ſaid iſland of MARTINICO, upon the SURRENDER thereof to the *Britiſh* arms, dated the ſeventh day of *February*, 1762, are the following ARTICLES, that is to ſay,

Special verdict.

Iſland of Grenada in the poſſeſſion of the French king till conquered by Great Britain in 1762

Cuſtoms and duties upon goods imported and exported levied upon the iſland by the French king.

Surrender of the iſland of Grenada upon the ſame terms as Martinico.

Articles in the capitulation of Martinico.

"ARTICLE the fourth—" They ſhall be ſtrictly neuter, and ſhall not be obliged to take arms againſt his moſt Chriſtian Majeſty; nor even againſt any *other* power."

Article 4.

They become ſubjects of his Britannic majeſty.

Anſwer—“ They become ſubjects of his *Britannic* Majeſty, an
“ muſt take the oath of allegiance, but ſhall not be obliged to tak
“ arms againſt his moſt Chriſtian Majeſty until a peace may dete
“ mine the fate of the iſland.”

Article 5.

ARTICLE the fifth—“ They ſhall preſerve their civil govern
“ ment, their LAWS, cuſtoms, and ordinances: Juſtice ſhall be ad
“ miniſtered by the ſame officers who are now in employment
“ and there ſhall be a regulation made for the interior police be
“ tween the governor of his *Britannic* Majeſty and the inhabitants
“ And in caſe that at the peace the iſland ſhall be ceded to the Kin
“ of *Great Britain*, it ſhall be allowed to the inhabitants to pre
“ ſerve their POLITICAL GOVERNMENT, and to accept that o
“ *Antigua* or *St. Chriſtopher's*.”

They ſhall be governed by their preſent laws until his majeſty's pleaſure be known.

Anſwer—“ They become *Britiſh* ſubjects, (as in the precedin
“ article) but ſhall continue to be governed by their PRESENT law
“ until his Majeſty's pleaſure be known.”

Article 6.

ARTICLE the ſixth—“ The inhabitants, as alſo the religious or
“ ders, of both ſexes, ſhall be maintained in the property of thei
“ effects, moveable and immoveable, of what nature ſoever, an
“ ſhall be preſerved in their privileges, rights, honours, and ex
“ emptions; their *free* negroes and mulattoes ſhall have the entir
“ enjoyment of their liberty.”

They ſhall have the enjoyment of their property as his majeſty's ſubjects, and the ſame privileges as the inhabitants of his majeſty's other Leeward Iſlands.

GRANTED, in regard to the religious orders—“ The inhabitants
“ *being ſubjects of Great Britain*, will enjoy their properties, and th
“ SAME PRIVILEGES as in the other his Majeſty's Leewar
“ Iſlands.”

Article 7. To pay to his majeſty no other duties than thoſe before paid to the French king.

ARTICLE the ſeventh—“ They ſhall *not* pay to his Majeſty an
“ *other* duties *than thoſe which have been paid hitherto to his mo*
“ *Chriſtian Majeſty*; and the *capitation* of negroes upon the ſam
“ footing it is paid at *preſent*, without any other charges or impoſts
“ And the expences of juſtice, penſions to curates, and other occa
“ ſional expences, ſhall be paid by the domain of his *Britann*
“ Majeſty, as they were by that of his moſt Chriſtian majeſty.”

Referred for anſwer to the 6th article.

ANSWERED in the ſixth article, as to what regards the inhabitants.

Article 11.

ARTICLE the eleventh—“ No other than the inhabitants reſiden
in this iſland ſhall, till the peace, poſſeſs any eſtates, either by ac

quiſition, agreement or otherwiſe: But in caſe at the peace the country ſhall be ceded to the King of *Great Britain*, then it ſhall be permitted to the inhabitants who ſhall not be willing to become his ſubjects to *ſell their eſtates*, moveable and immoveable, to whom they pleaſe, and retire where they ſhall think proper; in which caſe they ſhall be allowed convenient time. [Anſwer] All ſubjects of *Great Britain* may poſſeſs any lands or houſes by purchaſe. The remainder of this article GRANTED, *provided* they ſell to *Britiſh* ſubjects."

In caſe of a peace, if the country ſhall be ceded to the King of Great Britain, thoſe who pleaſe may ſell their eſtates to Britiſh ſubjects, and retire out of the iſland

And the jurors aforeſaid, upon their oaths aforeſaid further ſay.—THAT in the DEFINITIVE TREATY OF PEACE and friendſhip between his *Britannic* Majeſty, the moſt Chriſtian King and the King of *Spain*, concluded at *Paris* the 10th day of *February* 1763, amongſt others are the following ARTICLES:

Definitive treaty of peace between the King of Great Britain, the French King, and the King of Spain 10th Febr. 1763.

ARTICLE the fourth—"His moſt Chriſtian Majeſty renounces all pretenſions which he has heretofore formed or might form to NOVA SCOTIA, or *Acadia*, in all its parts; and guarranties the whole of it and with all its dependancies to the King of *Great Britain*: Moreover his moſt Chriſtian Majeſty CEDES and guarranties to his ſaid *Britannic* Majeſty in full right CANADA, with all its dependances, as well as the iſland of *Cape Breton*, and all the other iſlands and coaſts in the Gulph and River of *St. Lawrence*. And in general *every thing that depends* on the ſaid countries, lands, iſlands and coaſts, with the ſovereignty, property, poſſeſſion, and all rights acquired by treaty or otherwiſe, which the moſt Chriſtian King and the crown of *France* have had until now over the ſaid countries, iſlands, lands, places, coaſts, and their inhabitants: So that the moſt Chriſtian King cedes and makes over the whole to the ſaid King and to the crown of *Great Britain*; and that in the moſt ample manner and form without reſtriction, and without any liberty to depart from the ſaid ceſſion and guarranty under any pretence, or to diſturb *Great Britain* in the poſſeſſions above mentioned.—His *Britannic* Majeſty on his ſide AGREES to grant the liberty of the catholic religion to the inhabitants of *Canada*: He will conſequently give the moſt preciſe and effectual orders, that his new Roman catholic ſubjects may profeſs the worſhip of their religion, according to the rights* of the Romiſh church, ſo far as the laws of *Great Britain* can permit.—His *Britannic* majeſty further agrees that the *French* inhabitants or others who had been ſubjects of the moſt Chriſtian King in *Canada*, may retire with all ſafety and freedom wherever they ſhall think proper, and may ſell their eſtates provided it be to ſubjects of his *Britannic* Majeſty, and bring away their effects as well as their perſons without being reſtrained in their emigration under any pretence, except that of debts or criminal proſecutions. The term limited for this emigration, ſhall be fixed to the ſpace of

" eighteen

Article 4th. Ceſſion of Nova Scotia, Canada, and all the dependancies of each to the King and crown of Great Britain.

Qu. rites.

" eighteen months to be computed from the day of the exchang
" of the ratifications of the preſent treaty."

Article 9th. Ceſſion of *Grenoda* &c. to the King of Great Britain.

ARTICLE the ninth—" The moſt Chriſtian King cedes an
" guarranties to his *Britannic* Majeſty in full right the iſlands
" GRANADA, with the ſame ſtipulations in favour of the inhabi
" ants of this colony, inſerted in the 4th article for thoſe of *Canad*
" And the partition of the iſlands called *Neutral* is agreed an
" fixed; ſo that thoſe of *St. Vincent*, *Dominica*, and *Tobago*, ſha
" remain in full right to *Great Britain*, and that of *St. Lucia* ſha
" be delivered to *France*, to enjoy the ſame likewiſe in full righ
" And the high contracting parties guarranty the partition ſo ſtipu
" lated."

Proclamation of the King of Great Britain, 7th of October 1763, promiſing a legiſlative aſſembly as ſoon as the ſtate and circumſtances of the new governments will admit; and that in the meanwhile perſons inhabiting or reſorting may confide in the royal protection for the enjoyment of the benefit of the laws of England; for the adminiſtration of which courts of juſtice ordered to be erected.

And the jurors aforeſaid upon their *oaths* aforeſaid further ſa
that his Majeſty, by his royal PROCLAMATION bearing date
Weſtminſter the 7th day of *October*, 1763, amongſt other thing
declared as follows, " AND WHEREAS it will greatly contribute
" the *ſpeedy ſettling* our ſaid new governments that our loving ſub
" jects ſhould be informed of our paternal care for the ſecurity
" the *liberties* and *properties* of thoſe who are and *ſhall* become in
" habitants thereof; we have thought fit to *publiſh and declare*, b
" this our proclamation, that we have, in the letters patent und
" our great ſeal of *Great-Britain*, by which the ſaid governmen
" are conſtituted, given *expreſs* power and *direction* to our gove
" nors of our ſaid colonies reſpectively, that, *ſo ſoon as the ſtate an*
" *circumſtances of the ſaid colonies will admit thereof*, they ſhall, wi
" the advice and conſent of the members of our council, SUMMO
" and CALL *general* ASSEMBLIES within the ſaid government r
" ſpectively, in ſuch manner and form as is uſed and directed
" thoſe colonies and provinces in *America*, which are under o
" immediate government.—And we have alſo given power
" the ſaid governors, with the *conſent* of our ſaid councils and t
" *repreſentatives* of the *people*, ſo to be *ſummoned* as aforeſaid,
" make *conſtitutions* and *ordain* LAWS, *ſtatutes* and ordinances, f
" the public welfare and good government of our ſaid colonies a
" of the people and inhabitants thereof, *as near as may be, agre*
" *able to the laws of England*, and under ſuch regulations and r
" ſtrictions as are uſed in other colonies. And in the *mean time* a
" *until ſuch aſſemblies* CAN be *called* as aforeſaid, all perſons inhabi
" ing in, or *reſorting* to our ſaid colonies, may confide in our roy
" protection for the enjoyment of the benefit of the LAWS of o
" REALM of ENGLAND: For which purpoſe we have given pow
" under our great ſeal to the governors of our ſaid colonies reſpe
" tively, to erect and conſtitute, with the advice of our ſaid cou
" cils reſpectively, courts of judicature and public juſtice within o
" ſaid colonies, for the hearing and determining all cauſes as w
" criminal as civil according to law and equity, and as near as m
"

“be agreeable to the laws of *England*; with liberty to all perſons who may think themſelves aggrieved by the ſentences of ſuch courts in all civil cauſes to appeal, under the uſual limitations and reſtrictions, to us in our privy council.”

Proclamation 26th March 1764, declaring a ſurvey ordered for the diviſion of the iſland of Granada, &c. into proper pariſhes and diſtricts; and for providing for the more beneficial culture of the ſaid iſland &c.

And the jurors aforeſaid, upon their OATHS aforeſaid, further ſay—That his Majeſty by his royal PROCLAMATION bearing date at *Weſtminſter*, the 26th day of *March* 1764, amongſt other things did alſo *declare* as follows, “WHEREAS we have taken into our conſideration the great benefit that will ariſe to the commerce of our kingdoms and the intereſt of our ſubjects, from the ſpeedy ſettlement of the iſlands of GRENADA, the *Grenadines*, *Dominica*, *St. Vincent* and *Tobago*, we do therefore think fit, with the advice of our privy council, to iſſue this our royal proclamation, to publiſh and declare to our loving ſubjects that we have, with the advice of our ſaid privy council, given the neceſſary powers and directions for an immediate ſurvey, and diviſion into proper pariſhes and diſtricts, of ſuch of the ſaid iſlands as have not hitherto been ſo ſurveyed and divided; and for laying out ſuch lands in the ſaid iſlands as are in our power to diſpoſe of into allotments for plantations of different ſize and extent, according as the nature of the land ſhall be more or leſs adapted to the growth of ſugar, coffee, cocoa, cotton, or other articles of beneficial culture; reſerving to us, our heirs and ſucceſſors, ſuch parts of the ſaid iſlands as ſhall be neceſſary for erecting fortifications thereon, and for all other military purpoſes; for glebes for miniſters, allotments for ſchool-maſters, for wood-lands, high-roads, and all other public purpoſes: And alſo reſerving ſuch lands in our iſlands of *Dominica* and *St. Vincent*, as at the time of the ſurrender were and ſtill are in the poſſeſſion of the *French*, inhabitants of the ſaid iſlands; which lands it is our will and pleaſure ſhould be granted to ſuch of the ſaid inhabitants as ſhall be inclined to accept the ſame upon leaſes for terms abſolute, or for renewable terms upon certain conditions, and under proper reſtrictions. And we do hereby farther publiſh and declare, that the allotments for plantations in our iſlands of *Grenada*, the *Grenadines*, *Tobago* and *St. Vincent*, ſhall contain from one hundred to three hundred acres, with ſome few allotments in each iſland of five hundred acres; and that the allotments in our iſland of *Dominica*, which is repreſented to be not ſo well adapted to the cultivation of ſugar, and which from its ſituation requires in policy to be well peopled with white inhabitants, ſhall be in general from fifty to an hundred acres.—That each purchaſer of lands which have been cleared and improved, ſhall within the ſpace of three months from the date of the grant ſettle and conſtantly keep upon the lot purchaſed one white man or two white women, for every hundred acres contained in the ſaid lot, and in default thereof ſhall be ſubject to the payment of 20*l. per annum* for every white

" woman, and 40*l.* *per annum* for every white man, that ſhall b
" wanting to compleat the number. That the purchaſer of unclear
" ed lands ſhall clear and cultivate one acre in every twenty in eac
" year, until half the land ſo purchaſed ſhall be cleared, and i
" default thereof ſhall pay 5*l.* *per annum* for every acre not cleare
" purſuant to ſuch condition. And ſuch purchaſer ſhall alſo be ob
" liged to ſettle and conſtantly keep upon the lot ſo purchaſed, on
" white man or two white women for every hundred acres as th
" ſame ſhall be cleared. That each purchaſer, beſides the pur
" chaſe money, ſhall be ſubject to the payment of an annual quit
" rent to us, our heirs and ſucceſſors, of ſix-pence *per* acre, unde
" the penalty of 5*l.* *per* acre upon non-payment thereof. Suc
" quit-rents in the caſe of the purchaſe of cleared lands to com
" mence from the date of the grant, and the firſt payment to b
" made at the expiration of the firſt year; and in caſe of the pur
" chaſe of the uncleared lands, ſuch quit-rents to commence at th
" expiration of twelve months from the time each acre is cleared
" That in caſe of failure in the payment of the purchaſe money i
" the manner above directed, the purchaſer ſhall forfeit all right t
" the lands purchaſed."

Letters patent, 9th of April 1764, appointing Robert Melville, Eſq; Governor of Grenada.

And the jurors aforeſaid, upon their OATHS aforeſaid, furthe
ſay, That his Majeſty by his LETTERS PATENT, under his wri
of privy ſeal bearing date at *Weſtminſter*, the 9th day of *April* 176
appointed *Robert Melville*, Eſq; Captain General and Governor i
Chief in and over the iſlands of *Grenada*, the *Grenadines*, *Dominica*
St. Vincent, and *Tobago*, in *America*; and of all other iſlands an
territories adjacent thereto: Which ſaid LETTERS PATENT are a
follows.—" GEORGE the third by the grace of God, of *Great Bri*
" *tain*, *France* and *Ireland*, King, defender of the faith, *&c.* T
" our truſty and well beloved *Robert Melville*, Eſq; GREETING
" WHEREAS we did by our letters patent under our great ſeal o
" *Great Britain*, bearing date at *Weſtminſter*, the 4th day of *Apri*
" in the firſt year of our reign conſtitute and appoint *Charles Pin*
" *fold*, Eſq; Captain-General, and Governor in Chief in and ove
" our iſlands of *Barbadoes*, *St. Lucia*, *Dominica*, *St. Vincent*, *To*
" *bago*, and the reſt of our iſlands, colonies and plantations, in *Ame*
" *rica*, commonly called or known by the name of our *Caribb*
" iſlands lying and being to the windward of *Guadaloup*, and whic
" then were or after ſhould be under our ſubjection and governmen
" during our will and pleaſure, as by the ſaid recited letters paten
" relation being thereunto had, may more fully and at large appear
" NOW KNOW YOU that we have revoked and determined, and b
" theſe preſents do revoke and determine, ſuch part and ſo muc
" of the ſaid recited letters patent, and every clauſe, article an
" thing, therein contained as relates to or mentions the iſlands o
" *St. Lucia*, *Dominica*, *St. Vincent*, and *Tobago*. AND FURTHE
" KNOW YOU, that we, repoſing eſpecial truſt and confidence i

" th

"the prudence, courage and loyalty, of you the ſaid *Robert Melville*; of our eſpecial grace, certain knowledge, and meer motion, have thought fit to conſtitute and appoint, and by theſe preſents do conſtitute and appoint, you the ſaid *Robert Melvill* to be our Captain-General and Governor in Chief, in and over our iſlands of GRENADA, the *Grenadines*, *Dominica*, *St. Vincent*, and *Tobago*, in *America*, and of all other iſlands and territories adjacent thereto, and which now are or heretofore have been dependant thereupon. AND we do hereby require and command you to do and execute all things in due manner, that ſhall belong to your ſaid command, and the truſt we have repoſed in you, according to the ſeveral powers and directions granted or appointed you by this preſent commiſſion, and the inſtructions and authorities herewith given to you, or by ſuch further powers, inſtructions and authorities, as ſhall at any time hereafter be granted or appointed you, under our ſignet and ſign manual, or by our order in our privy counſel, and according to ſuch *reaſonable laws* and ſtatutes as *ſhall* hereafter be *made* and agreed upon by you, with the *advice* and *conſent* of the counſel and *aſſembly* of the *iſlands* and plantations under your government, in ſuch manner and form as is herein after expreſſed. AND our will and pleaſure is that you the ſaid *Robert Melville* do, after the publication of theſe our letters patent, and after the appointment of our council for our ſaid iſlands, in ſuch manner and form as is preſcribed in the inſtructions which you will herewith receive, in the firſt place take the OATHS appointed to be taken by an act paſſed in the firſt year of the reign of King *George* the firſt entitled, '*An act* for the further ſecurity of his Majeſty's perſon and government, and the ſucceſſion of the crown in the heirs of the late Princeſs *Sophia*, being Proteſtants; and for extinguiſhing the hopes of the pretended Prince of *Wales* and his open and ſecret abettors:' As alſo that you make and ſubſcribe the declaration mentioned in an act of parliament made in the 25th year of the reign of King *Charles* the ſecond, intitled '*An act* for preventing dangers which may happen from Popiſh recuſants.'—AND likewiſe that you take the oath uſually taken by governors in the other colonies, for the due execution of the office and truſt of our Captain-General and Governor in Chief in and over our ſaid iſlands, and for the due and impartial adminiſtration of juſtice.—AND farther that you take the oath required to be taken by the governors of the plantations to do their utmoſt, that the ſeveral laws relating to trade and the plantations be duly obſerved; WHICH ſaid OATHS and DECLARATION our COUNCIL of our ſaid iſlands, or any three of the members thereof, have hereby full power and authority, and are required, to tender and adminiſter to you: And in your abſence to your Lieutenant-General of the ſaid iſlands, and to our Lieutenant-Governors of each of our ſaid iſlands reſpectively, the ſaid OATHS mentioned in the ſaid act intitled, '*An act* for the further

To govern according to his inſtructions, and according to ſuch reaſonable laws as ſhall be made, with the advice and conſent of the council and aſſembly.

" ſecurity of his Majeſty's perſon and government, and the ſucc
" ſion of the crown in the heirs of the late Princeſs *Sophia*, bei
" Proteſtants, and for extinguiſhing the hopes of the pretend
" Prince of *Wales*, and his open and ſecret abettors:' As alſo ca
" them to make and ſubſcribe the aforeſaid DECLARATION, a
" to adminiſter unto them the uſual OATHS for the due executi
" of their places and truſts.—AND we do further give and gr
" unto you the ſaid *Robert Melville*, full power and authority fro
" time to time, and at any time hereafter, by yourſelf, or by a
" other to be authorized by you in this behalf, to adminiſter a
" give the OATHS mentioned in the ſaid act, for the further ſecur
" of his Majeſty's perſon and government, and the ſucceſſion of t
" crown in the heirs of the late Princeſs *Sophia*, being Proteſtan
" and for extinguiſhing the hopes of the pretended Prince of *Wa*
" and his open and ſecret abettors, to all and every ſuch perſon a
" perſons as you ſhall think fit, who ſhall at any time or times p
" into any of our ſaid iſlands, or ſhall be reſident or abiding ther

" AND we do hereby authorize and impower you to keep a
" uſe the public ſeal, which will be herewith delivered to you,
" ſhall hereafter be ſent to you, for ſealing all things whatſoever th
" ſhall paſs the great ſeal of our ſaid iſland.

Power and authority, with the advice of council, as ſoon as circumſtances ſhall admit, and as often as need ſhall require, to call general aſſemblies.

" AND we do hereby give and grant unto you the ſaid *Robe*
" *Melville*, full power and AUTHORITY, with the ADVICE a
" CONSENT of our ſaid COUNCIL to be appointed as aforeſaid,
" ſoon as the ſituation and circumſtances of our iſlands under yo
" government will admit thereof, and when and as often as ne
" ſhall require, to *ſummon* and *call* GENERAL ASSEMBLIES
" the freeholders and planters jointly or ſeverally within any of t
" iſlands under your government, in ſuch manner as you in yo
" diſcretion ſhall judge moſt proper, or according to ſuch furth
" powers, inſtruction or authorities, as ſhall be at any time herea
" ter granted or appointed you under our ſignet and ſign manua
" or by our order in our privy council.

Perſons duly elected by the major part of the freeholders to take the oaths, &c.

" AND our will and pleaſure is that the perſons thereupon du
" elected by the major part of the freeholders of the reſpective pariſh
" or precincts, and ſo returned, ſhall before their ſitting take t
" OATHS mentioned in the ſaid act intitled, '*An act* for the furth
" ſecurity of his Majeſty's perſon and government, and the ſucce
" ſion of the crown in the heirs of the late Princeſs *Sophia*, being Pr
" teſtants, and for extinguiſhing the hopes of the pretended Prin
" of *Wales*, and his open and ſecret abettors:' As alſo make a
" ſubſcribe the aforementioned declaration, WHICH OATHS a
" declaration you ſhall commiſſionate fit perſons under the publ
" ſeal of thoſe our iſlands to tender and adminiſter unto them
" And until the ſame ſhall be ſo taken and ſubſcribed, no perſo
ſha

ſhall be capable of ſitting, though elected. AND we do hereby declare, that the perſons ſo elected and qualified ſhall be called and deemed the ASSEMBLY of that iſland within which they ſhall be choſen, *or the aſſembly of our ſaid iſlands in general.* AND that you the ſaid *Robert Melville*, by and with the ADVICE and CONSENT of our ſaid COUNCIL and ASSEMBLY OR ASSEMBLIES, or the major part of them, ſhall have FULL POWER and authority to *make, conſtitute,* and *ordain* LAWS, ſtatutes, and ordinances, for the public peace, welfare, and good government of our ſaid iſlands, *jointly or ſeverally*, and of the people and inhabitants thereof, and ſuch others as ſhall reſort thereunto, and for the benefit of us, our heirs and ſucceſſors. Which ſaid LAWS, ſtatutes, and ordinances, are not to be repugnant, but, *as near as may be, agreeable to the laws and ſtatutes of this our kingdom of Great Britain.* Provided, that all ſuch laws, ſtatutes, and ordinances, of what nature or duration ſoever, be, within three months or ſooner after the making thereof, tranſmitted to us, under our ſeal of our ſaid iſlands, for our approbation or diſallowance of the ſame; as alſo duplicates thereof by the next conveyance.

And then ſo elected and qualified, to be called and deemed the aſſembly of the iſland, or the aſſembly of the ſaid iſlands in general. The governor and council, with the ſaid aſſembly or aſſemblies, to have full power to make laws for the ſaid iſlands jointly or ſeverally.

"AND in caſe any or all of the ſaid laws, ſtatutes, and ordinances, not before confirmed by us, ſhall at any time be diſallowed, and not approved, and ſo ſignified by us, our heirs and ſucceſſors, under their ſignet or ſign manual, or by order of our or their privy council, unto you the ſaid *Robert Melville*, or to the commander in chief of the ſaid iſlands for the time being, then ſuch and ſo many of the ſaid laws, ſtatutes, and ordinances, as ſhall be ſo diſallowed and not approved, ſhall from thenceforth ceaſe, determine, and become utterly void and of no effect, any thing to the contrary thereof notwithſtanding.

"AND to the end that nothing may be paſſed or done by our ſaid council or aſſemblies to the prejudice of us, our heirs and ſucceſſors, we will and ordain that you the ſaid *Robert Melville* ſhall have and enjoy a negative voice in the making and paſſing all laws, ſtatutes, and ordinances, as aforeſaid. AND that you ſhall and may likewiſe, from time to time, as you ſhall judge neceſſary, adjourn, prorogue or diſſolve, all general aſſemblies as aforeſaid."

AND the jurors aforeſaid, on their OATHS aforeſaid, farther ſay, THAT his Excellency *Robert Melville*, Eſq; arrived in GRENADA on the fourteenth of *December*, 1764, and, in conſequence of the laſt mentioned letters patent, took upon him the government of the ſame, and of the other iſlands therein named. And that, in conſequence of the laſt mentioned letters patent, a MEETING of the

Arrival of governor Melville in Grenada 14 Dec. 1764. In conſequence of the letters patent a meeting of the governor, council, and aſſembly, held in the latter end of the year 1765.

governor, council, and aſſembly of the ſaid iſland of GRENAD was held there in the latter end of the year 1765.

AND that his Majeſty, by his letters patent under the great ſe of *Great Britain*, bearing date at *Weſtminſter* the twentieth day o *July*, in the fourth year of his reign, and in the year of our LOR 1764, did order, direct and appoint, that an IMPOST OR CUSTOM o four and a half *per cent.* in ſpecie ſhould, *from and after* the 29t day of *September* then next enſuing, be raiſed and paid to his hei and ſucceſſors, for and upon all dead commodities of the growth an produce of the ſaid iſland of GRENADA that ſhould be ſhipped o from the ſame, in lieu of all cuſtoms and impoſt duties to that tim collected upon goods imported and exported into and out of the ſai iſland, under the authority of his moſt Chriſtian Majeſty. WHIC ſaid letters patent are in the words following: "GEORGE the thir " by the grace of GOD, of *Great Britain*, *France*, and *Irelan* " king, defender of the faith, *&c.* TO ALL TO WHOM THES " PRESENTS SHALL COME, GREETING: WHEREAS a certain IM " POST OR CUSTOM of *four pounds* and an *half* in ſpecie for eve " *hundred* weight of the commodities of the growth and produ " of the iſland of *Barbadoes*, and of the *Leeward Carribbee* iſlan " in *America*, ſhipped off from the ſame, or any of them, is *pa* " and *payable* to us, our *heirs* and *ſucceſſors*; AND WHEREAS t " iſland of GRENADA was conquered by us during the late wa " and has been ceded and ſecured to us by the late *treaty* of *peac* " AND WHEREAS *it is reaſonable and expedient, and of importan* " *to our other Sugar iſlands, that the like duty ſhould take place in o* " *ſaid iſland of* GRENADA; we have thought fit, and our roy " will and pleaſure is, AND we do hereby, by virtue of our *pre* " *gative royal*, *order*, direct and appoint, that an IMPOST or custo " of FOUR and AN HALF *per* CENT. in ſpecie ſhall, from and aft " the 29th day of *September* next enſuing the date of theſe pr " ſents, be RAISED and PAID to us, our heirs and ſucceſſors, *f* " *and upon all dead* COMMODITIES *of the growth or produce of o* " *ſaid iſland of* Grenada *that ſhall be ſhipped off from the ſame*; " LIEU *of all cuſtoms and impoſt duties hitherto collected upon goo* " *imported and exported into and out of the ſaid iſland under the a* " *thority of his moſt Chriſtian Majeſty*: AND that the ſame ſhall " *collected*, *paid*, and *levied* in *ſuch manner* and by *ſuch means*, a " *under ſuch* PENALTIES and FORFEITURES as the ſaid IMPO " or CUSTOM of *four and an half* per cent. *is*, and *may now* " *collected*, *paid*, and levied in our ſaid iſland of *Barbadoes*, and o " ſaid Leeward iſlands."

His Majeſty's letters patent, dated 20th of July, 1764, ordering and appointing an impoſt or cuſtom of four and an half per cent. in ſpecie for every hundred weight upon all dead commodities of the produce of the iſland of Grenada that ſhould be ſhipped off from the ſame, in lieu of all cuſtoms and impoſts before collected upon goods imported and exported under the authority of the French King. The letters patent reciting that ſuch impoſt is paid by Barbadoes and the Leeward iſlands of America; and reciting the conqueſt of Grenada, and the ceſſion thereof by the peace of Paris; and that it is reaſonable, expedient, and of importance to the other Sugar iſlands, that the like ſhould take place in the iſland of Grenada, and appointing, as above ſet forth, and under claim of the prerogative royal, an impo four and an half per cent. in ſpecie for every hundred weight of dead commodities, the produce of the iſl of Grenada, that ſhall be ſhipped off from thence, in lieu of all cuſtoms, &c. as above, to be collected paid in ſuch manner and means, and under ſuch penalties and forfeitures, as in the iſland of Barbadoes and Leeward iſlands.

A

"And we do hereby require and command the preſent governor "or commander in chief, and the governor or commander in chief "for the time being, and the OFFICERS of our CUSTOMS in the "ſaid iſland of GRENADA, NOW and *hereafter, for the time being*, "and all others whom it may concern, THAT *they do reſpectively* "*take care to* COLLECT, *levy*, and to receive the ſaid IMPOST or "cuſtom, according to our royal will and pleaſure, ſignified by "theſe preſents.

Commanding the governor and officers of the cuſtoms, now and hereafter, for the time being, to collect and receive the ſaid impoſt.

"And whereas a POLL-TAX was *levied* and *paid* by the *inhabitants* of our ſaid iſland of GRENADA whilſt it was under ſubjection to his moſt Chriſtian Majeſty, it is our royal will and pleaſure that ſuch poll-tax as was *levied*, *collected* and *paid* by the *inhabitants* of the ſaid iſland whilſt it was under ſubjection to his "moſt Chriſtian Majeſty, ſhall be *continued* therein during our royal "will and pleaſure; and that the ſame ſhall be *collected*, *levied*, and "paid to us, our heirs and ſucceſſors, at ſuch times and in ſuch "manner, and by ſuch ways and means, and under ſuch PENALTIES and FORFEITURES, and upon ſuch terms, and with ſuch "privileges and exemptions as the ſame was *collected*, *levied*, and "paid whilſt the ſaid iſland was under ſuch ſubjection to his moſt "Chriſtian Majeſty, *in as much* as the ſame are not contrary to the "laws of *Great Britain*.

And appointing the continuance of the poll-tax paid by the inhabitants of Grenada while under ſubjection to the crown of France; to be collected, levied, and paid in ſuch manner and by ſuch means, and with ſuch penalties and forfeitures, and with ſuch privileges and exemptions as whilſt it was under ſuch ſubjection, in as much as the ſame are not contrary to the laws of Great Britain.

"And that the account and number of the inhabitants and ſlaves "therein ſhall be, from time to time, kept and delivered in by ſuch "perſon and perſons, and at ſuch time and times, and under ſuch "regulations, ſanctions, penalties and forfeitures reſpectively, as and "under which the ſame were taken, kept and delivered in during "the time the ſaid iſland was ſubject to his moſt Chriſtian Majeſty, "as aforeſaid, in as much as the ſame are not contrary to the laws "of *Great Britain*.

And an account of the inhabitants to be taken, kept and delivered, from time to time, in ſuch manner and by ſuch perſons, and with ſuch penalties, &c. as when the iſland was in ſubjection to France, in as much as the ſame are not contrary, as above.

"And we do hereby require and command the preſent governor "or commander in chief, for the time being, of our ſaid iſland of "GRENADA, and the ſeveral officers of our revenue, now, and for "the time being, and all others whom it may concern, that they "do reſpectively take care to collect, levy, and receive the money "ariſing and to ariſe by the ſaid tax, and to *pay* and account for the "ſame to the receiver general and collector of our caſual revenue "in our ſaid iſland, for the time being, according to our royal will "and pleaſure ſignified by theſe preſents."

Which ſaid letters patent were afterwards duly *regiſtered* in the ſaid iſland, and were publickly announced by his Excellency *Robert Melville*,

Regiſtry of the ſaid letters patent. Publication of the ſaid letters Jan 1765.

Melville, Eſq; in the month of *January*, 1765, immediately ſu
ceeding his arrival in the ſaid iſland of GRENADA.

And the jury find that before the making of the ſaid letters patent the ſaid duty of four and an half per cent. was and yet is paid in the iſland of Barbadoes and the Leeward iſlands, in purſuance or by virtue of acts
aſſembly herein after ſet forth

AND the jurors aforeſaid, upon their oaths aforeſaid, farther ſa
THAT the *ſaid duty* of *four* and an *half per cent.* before the makin
of the ſaid laſt mentioned letters patent, was and yet is paid in t
iſland of *Barbadoes*, and the Leeward Caribbee iſlands, in purſuan
or by virtue of ACTS of aſſembly paſſed in the ſame iſlands here
after ſet forth.

Act of Barbadoes 12 Sept. 1663, for ſettling an impoſt on the commodities of the growth of that iſland; reciting the grant of Car. 1. of the proprietary government of the ſaid iſland of Barbadoes to the Earl of Carliſle; and that Car. 2. had inveſted himſelf by purchaſe in all the rights of the ſaid Earl in the ſaid iſland, and had taken the iſland under his protection, and by letters patent of the 12th of June in the ſame year 1663, had appointed Francis Lord Willoughby de Parham governor of Barbadoes, and of all the Carribee iſlands; and reciting that by virtue of the ſaid Earl of Carliſle's patent divers governors and agents were ſent over with authority to make grants to ſuch perſons as they ſho
think fit, which they performed; and reciting the loſs of many.

AND the jurors aforeſaid, upon their OATHS aforeſaid, farth
ſay, That by an ACT of ASSEMBLY of the iſland of *Barbadoes*,
the *Weſt-Indies*, paſſed in the ſaid iſland on the twelfth day of *Se*
tember, 1663, intitled, "*An act for ſettling an impoſt on the comm*
"*dities of the growth of that iſland*," it is amongſt other things r
cited and enacted as follows:

"WHEREAS our late Sovereign Lord *Charles* the firſt, of bleſſ
" memory, did, by his letters patent under the great ſeal of *En*
" *land*, grant and convey unto *James*, Earl of *Carliſle*, and his he
" for ever, the propriety of this iſland of *Barbadoes*; AND his ſ
" cred Majeſty that now is having by purchaſe inveſted himſelf
" all the rights of the ſaid Earl of *Carliſle*, and in all other righ
" which any other perſon may claim from that patent, or any othe
" and thereby more immediately and particularly hath* taken th
" iſland unto his royal protection: AND his moſt excellent Majeſ
" having, by letters patent under the great ſeal of *England*, beari
" date the twelfth of *June*, in the fifteenth year of his reign, a
" pointed his Excellency *Francis*, Lord *Willoughby*, of *Parha*
" captain general and chief governor of *Barbadoes*, and all the Ca
" ribbee iſlands, with full power and authority to grant, confir
" and aſſure to the inhabitants of the ſame, and their heirs for ev
" all lands, tenements, and hereditaments, under his Majeſty's gr
" ſeal appointed for *Barbadoes*, and the reſt of the Carribbee iſland
" as, relation being thereunto had, may and doth more at lar
" appear.

" AND whereas, by virtue of the ſaid Earl of *Carliſle*'s pate
" divers governors and agents have been ſent over hither with a
" thority to lay out, ſet, grant, or convey in parcels the land wit
" in this iſland, to ſuch perſons as they ſhould think fit, which w
" by them, in their reſpective times, as much as in them lay, a
" cordingly performed. AND whereas many have loſt their gran

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* *R.* having.

“warrants, and other evidences for the ſaid lands, and others, by reaſon of the ignorance of thoſe times, want ſufficient and legal words to create inheritances to them and their heirs; and others that never recorded their grants and warrants; and others that can make no proof of any grants or warrants they ever had for their lands, and yet have been long and quiet poſſeſſors of the ſame, and beſtowed great charges thereon. AND whereas the acknowledgment of forty pounds of cotton *per* head, and other taxes and compoſitions formerly raiſed to the Earl of *Carliſle* was held very heavy. For a full remedy for all the defects afore related, and quieting the poſſeſſions, and ſettling the tenures of the inhabitants of this iſland, BE IT ENACTED by his EXCELLENCY *Francis*, Lord *Willoughby*, of *Parham*, and his COUNCIL, and gentlemen of the ASSEMBLY, and by the AUTHORITY of the ſame, THAT, notwithſtanding the defects afore related, all the now rightful poſſeſſors of lands, tenements and hereditaments, within this iſland, according to the laws and cuſtoms thereof, may at all times repair unto his Excellency for the full confirmation of their eſtates and tenures, and then and there ſhall and may receive ſuch full confirmation and aſſurance, under his Majeſty's great ſeal for this iſland, as they can reaſonably adviſe or deſire, according to the true intent and meaning of this act.

The want of legal words of conveyance in ſome; the want of having been regiſtered in others; and the long and quiet poſſeſſion of others, with great charges, but without evidence of title; and reciting the acknowledgment of 40 pounds of cotton, as a poll-tax, with other compoſitions, raiſed to the Earl of Carliſle, to have been held very heavy; and, for remedy of theſe ſeveral defects, enacting a ſecurity for the rightful poſſeſſors of land within the iſland.

AND *be it farther enacted*, by the authority aforeſaid, That *all and every the payments of forty pounds of cotton* per *head, and all other duties, rents, and arrears of rents, which have or might have been levied, be from henceforth abſolutely and fully releaſed and made void*; AND that the inhabitants of this iſland have and hold their ſeveral plantations to them and their heirs for ever, *in free and common ſocage.* YIELDING and PAYING, therefore, at the feaſt of St. *Michael* every year, if the ſame ſhall be lawfully demanded, *one ear of* Indian *corn*, to his Majeſty, his heirs and ſucceſſors for ever, in *full and free diſcharge of all* rents and ſervices for the future, *in conſideration* of the releaſe of the ſaid forty pounds, and in conſideration of the confirmation of all eſtates in this iſland, as aforeſaid, and in acknowledgment of his Majeſty's grace and favour in ſending to and appointing over us his ſaid Excellency, of whoſe prudence and moderate government we have heretofore had large experience, and do reſt moſt aſſured thereof for the future.

And annulling for the future the payment of the above poll-tax, and all other duties, rents, and arrears of rents, which were or might be levied; the inhabitants to hold to them and their heirs for ever in free ſocage, on a nominal rent to his Majeſty, his heirs and ſucceſſors, for all rents and ſervices, in conſideration as expreſſed.

“AND foraſmuch as nothing conduceth more to the peace and proſperity of any place, and the protection of every ſingle perſon therein, than that the public revenue thereof may be in ſome meaſure proportioned to the public charges and expences; and alſo well weighing the great charges that there muſt be of neceſ-

And to maintain the honour and dignity of his Majeſty, for the public and private ſecu-

rity, for repairing forts, and other purpoſes expreſſed, they give and grant to his Majeſty, his heirs and ſucceſſors, an impoſt or cuſtom upon the native commodities of the ſaid iſland of Barbadoes, viz. upon all dead commodities exported four and a half in ſpecie for every five ſcore.

“ ſity in the maintaining the honour and dignity of his Majeſty
“ authority here; the public meeting of the ſeſſions; the often a
“ tendance of the council; the reparation of the forts; the buil
“ ing a ſeſſions-houſe and a priſon; and all other public charges i
“ cumbent on the government; DO, in conſideration thereof, GI
“ and GRANT unto his Majeſty, his heirs and ſucceſſors for ev
“ and do moſt humbly deſire your Excellency to accept theſe o
“ grants: And we humbly pray your Excellency that it may
“ enacted, AND BE IT ENACTED, by his EXCELLENCY *Franc*
“ Lord *Willoughby*, of *Parham*, captain general and chief govern
“ of this iſland of *Barbadoes*, and all other the Carribbee iſlan
“ and by and with the CONSENT of the COUNCIL, and the ge
“ tlemen of the ASSEMBLY, REPRESENTATIVES of this iſlan
“ and by authority of the ſame, That an IMPOST or cuſtom b
“ from and after publication hereof, *raiſed* upon the *native comm*
“ *dities* of this iſland, after the proportions and in manner and fo
“ as is hereafter ſet down and appointed, THAT is to ſay, upon
“ *dead commodities* of the growth or produce of this iſland, t
“ ſhall be ſhipped off the ſame ſhall be *paid* to our Soverei
“ Lord the King, his heirs and ſucceſſors for ever, *four and an b*
“ *in ſpecie for every five ſcore.*”

Act of aſſembly of St. Chriſtopher, to ſubject the commodities of the growth of the late French part of the iſland to the payment of the four and an half per cent. duty.

AND the jurors aforeſaid, upon their OATHS aforeſaid, fart
ſay, THAT, by an ACT of ASSEMBLY of the iſland of *St. Chriſ*
pher, in the *Weſt Indies*, paſſed in the ſaid iſland, in the year
our LORD 1727, intitled, “ *An act* to ſubject all goods and co
“ modities of the growth and produce of the late *French* part
“ the iſland of *St. Chriſtopher*, which are or ſhall be ſhipped
“ from the ſaid iſland, to the payment of the *four* and *an half*
“ *cent.* duty, and to aſcertain at what places all the duties of *f*
“ *and an half per cent.* ſhall be received.”

Reciting an act of the general council or aſſembly of the Leeward iſlands, Nevis, St. Chriſtopher, Antigua, and Montſerrat, for ſettling an impoſt on the commodities of the growth of the ſaid Leeward iſlands, whereby a cuſtom of 4 pounds and an half in ſpecie for every hundred weight was granted by the ſaid iſlands to Car. 2. for the exports of the commodities of a every the ſaid iſlands.

It is, amongſt other things, recited and enacted as follo
“ WHEREAS in and by an act or ſtatute of the general council
“ general aſſembly of the Leeward Carribbee iſlands, in *Amer*
“ called or known by the names of the iſland of *Nevis*, *St. Chri*
“ *pher*, *Antigua*, and *Montſerrat*, made in or about the year of
“ LORD 1663, and entitled, “ *An act* for ſettling an IMPOST
“ the commodities of the growth of the ſaid Leeward Carrib
“ iſlands,” a certain duty or cuſtom of four pounds and an half
“ ſpecie for every hundred weight of the commodities of the gro
“ and produce of the ſaid Leeward iſlands then afterwards to
“ ſhipped off from the ſaid iſlands, or any of them, was *given*
“ *granted* to our late Sovereign Lord *Charles* the ſecond, then K
“ of *England*, *Scotland*, *France*, and *Ireland*, and to his heirs
“ ſucceſſors for ever, as in and by the ſame act or ſtatute, rela
“ being thereunto had, may more fully and and at large appear

And whereas ſince the making of the ſaid ſtatute, to wit, in and by the late treaty of peace and friendſhip concluded at *Utrecht* between the two crowns of *Great Britain* and *France*, an entire ceſſion was made by the moſt Chriſtian King *Lewis* the fourteenth to our late Sovereign Lady *Anne*, queen of *Great Britain*, *France*, and *Ireland*, and to her crown for ever, of all that part of the iſland of *St. Chriſtopher* formerly belonging to the crown of *France*; ſo that the ſame late *French* part of the ſaid iſland of *St. Chriſtopher* is now become parcel of the realm of *Great Britain*, and is under the ſole dominion and government of the crown of the ſame.

Reciting the treaty of peace at Utrecht, by which the late French part of that iſland was ceded to Great Britain.

And whereas *ſome doubts* have ariſen, whether the ſaid late *French* part, ſo yielded up as aforeſaid to the ſaid crown of *Great Britain*, be *ſubject to the payment of the aforeſaid duties* of four and an half per cent. ſo as aforeſaid in and by the ſaid recited act given and granted to our ſaid late Sovereign Lord King *Charles* the ſecond, his heirs and ſucceſſors; for avoiding, therefore, all diſputes and controverſies which may for the future ariſe within the ſame iſland, touching or concerning the payment of the ſame duties, we, your Majeſty's moſt dutiful and loyal ſubjects *John Hart*, Eſq; your Majeſty's captain general, and GOVERNOR in chief of all your Majeſty's Leeward Carribbee iſlands in *America*, and the COUNCIL and ASSEMBLY of the ſaid iſland of *St. Chriſtopher*, do humbly beſeech your Majeſty that it may be enacted and *declared*, AND it is hereby ENACTED and *declared*, by the KING's moſt excellent Majeſty, by and with the advice and conſent of the captain general and governor in chief of the ſaid Leeward Carribbee iſlands, in *America*, and the council and aſſembly of the ſaid iſland of *St. Chriſtopher*, and by the authority of the ſame, THAT all and ſingular the goods and commodities of the growth and produce of the ſaid late *French* part of the ſaid iſland of *St. Chriſtopher*, and which at this time are, or hereafter ſhall be ſhipped off from thence, in order to be carried to any other port or place whatſoever, are and for ever after ſhall be ſubject and liable, and the ſame goods and commodities, and every of them, are hereby made ſubject and liable to the payment of the aforeſaid duties and cuſtoms of *four pounds* and *half a pound per cent.* in ſpecie, to your moſt ſacred Majeſty, your heirs and ſucceſſors, in ſuch manner and ſort as the goods and commodities of the growth and produce of that part of the ſaid iſland known and called by the name of the *Engliſh* part thereof, have heretofore and hitherto been ſubjected and liable unto by force and virtue of the above recited act or ſtatute.”

And that doubts have ariſen, whether the ſaid part, late of the French, be ſubject to the payment of the aforeſaid duties.

And enacting and declaring that the commodities exported from the ſaid part, late belonging to the French, are and ſhall be ſubject to the aforeſaid duty of four and an half per cent.

And the jurors aforeſaid, upon their oaths aforeſaid, farther ſay, That by an ACT of ASSEMBLY of the iſland of *Nevis*, in the *Weſt Indies*, paſſed in the ſaid iſland in the year of our LORD 1664, entitled,

Act of aſſembly of Nevis, 1664.

For ſettling an impoſt on the commodities of the growth of the ſaid iſland.

entitled, “ *An act for ſettling an impoſt on the commodities of t*
“ *growth of this iſland,*” it is, amongſt other things, recited a
“ enacted as follows:

“ Whereas our late Sovereign Lord *Charles* the firſt, of bleſſ
“ memory, did, by his letters patent under the great ſeal of *En*
“ *land*, grant and convey unto *James*, Earl of *Carliſle*, and his he
“ for ever, the propriety of this iſland of *Nevis*; And his
“ cred Majeſty that now is having by purchaſe inveſted himſelf
“ all the rights of the ſaid Earl of *Carliſle*, and in all other righ
“ which any other perſon may claim from that patent, or any othe
“ and thereby more immediately hath * taken this iſland and the re
“ of the Carribbee iſlands into his royal protection: And his mo
“ excellent Majeſty having, by letters patent under the great ſeal
“ *England*, bearing date the twelfth day of *June*, in the fifteent
“ year of his reign, appointed his Excellency *Francis*, Lord *Wi*
“ *loughby*, of *Parham*, captain general and chief governor of *Bar*
“ *badoes*, and the reſt of the Carribbee iſlands, with full pow
“ and authority to grant, confirm, and aſſure to the inhabitants
“ the ſame, and their heirs for ever, all lands, tenements, and here
“ ditaments, under his Majeſty's ſeal appointed for *Barbadoes*; an
“ the reſt of the Carribbee iſlands, as, relation being thereunto had
“ may and doth more at large appear.

“ And whereas, by virtue of the ſaid Earl of *Carliſle*'s paten
“ divers governors and agents have been ſent over hither with au
“ thority to lay out, ſet, grant, or convey in parcels the land with
“ in this iſland, to ſuch perſons as they ſhould think fit, which wa
“ by them, in their reſpective times, as much as in them lay, ac
“ cordingly performed. And whereas many have loſt their grants
“ warrants, or other evidences for their ſaid lands; and others, b
“ reaſon of the ignorance of thoſe times, want ſufficient and lawfu
“ words to create inheritances in them and their heirs; and other
“ that never recorded their grants and warrants; and others tha
“ can make no proof of any grants or warrants they ever had fo
“ their lands, and yet have been long and quiet poſſeſſors of th
“ ſame, and beſtowed great charges thereon. And we do humbl
“ pray your Excellency that it might be enacted, *and be it enacted*
“ by his Excellency *Francis*, Lord *Willoughby*, of *Parham*, captai
“ general and chief governor of the iſland of *Barbadoes*, and th
“ reſt of the Carribbee iſlands, and by and with the advice and con
“ ſent of the council and gentlemen of the aſſembly, repreſentative
“ of this iſland, and by the authority of the ſame, That an im
“ post or cuſtom be, from and after the publication hereof, *raiſe*
“ upon the native commodities of this iſland, after the proportio

---

* *R.* having.

“ and in manner and form as is hereafter ſet down and appointed: THAT is to ſay, upon all commodities of the growth or production of this iſland that ſhall be ſhipped off the ſame, ſhall be paid to our Sovereign Lord the King, his heirs and ſucceſſors for ever, four and an half in ſpecie for every [five]* ſcore.”

Act of aſſembly of Antigua, 19 May, 1668.

AND the jurors aforeſaid, upon their OATHS aforeſaid, farther ſay, That by an ACT OF ASSEMBLY of the iſland of *Antigua*, in the *Weſt Indies*, paſſed in the ſaid iſland on the 19th day of *May*, in the year of our LORD 1668, entitled, “ *An act for the ſettlement of the cuſtom or duty of four and a half per cent*,” it is, amongſt other things, recited and enacted as follows: “ Whereas by reaſon of the late unhappy war which aroſe betwixt his Royal Majeſty *Charles* the ſecond, King of *Great Britain*, *France*, and *Ireland*, &c. and the moſt Chriſtian King, in *France*, as well as the States General of the *United Netherlands*, ſeveral of his Majeſty of *Great Britain* his territories on this ſide the *Tropic*, became ſubject (through conqueſt) unto the ſaid *French* King and his ſubjects; and, amongſt others, this iſland of *Antigua* alſo was ſo ſubdued by Monſieur *de Labarr*, lieutenant general by ſea and land to the ſaid *French* King, being aſſiſted by the *Cannibal Indians*; by means whereof all the lands within this iſland became *forfeited* unto his Majeſty, &c. as by an act of this country, bearing date the tenth day of *April* laſt paſt (reference being thereunto had) may more at large appear. KNOW YE, that for *and* in *conſideration* of new grants and confirmation of our ſaid lands, under the great ſeal appointed for *Barbadoes*, and the reſt of the Carribbee iſlands, by his EXCELLENCY Lord *Willoughby*, of *Parham*, &c. we do GIVE and GRANT to his ſaid Majeſty, his heirs and ſucceſſors for ever, and moſt humbly deſire your Excellency to accept theſe our grants: And we do humbly pray your Excellency that it may be enacted, AND BE IT ENACTED, by his EXCELLENCY Lord *Willoughby*, of *Parham*, captain general and chief governor of *Barbadoes*, and the reſt of the Carribbee iſlands, and by and with the ADVICE and CONSENT of the COUNCIL, and gentlemen of the ASSEMBLY, REPRESENTATIVES of this iſland, and by the authority of the ſame, That an IMPOST or cuſtom be, from and after the publication hereof, *raiſed* upon the *native commodities* of this iſland, after the proportion and in manner and form as above ſet down, that is to ſay, upon all *commodities* of the growth or production of this iſland, that ſhall be ſhipped off the ſame, ſhall be *paid* to our Sovereign Lord the King, his heirs and ſucceſſors for ever, *four and an half in ſpecie for every five ſcore*.”

Reciting the conqueſt of Antigua by Mr. Labarr, lieutenant general of the French king. Forfeiture of lands in the iſland to the King of Great Britain. And in conſideration of new grants, giving and granting an impoſt of four and an half in ſpecie for every five ſcore, as above.

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* *Note*, “Five”. is not in my copy of the verdict, but is ſupplied as omitted by miſtake.

Eſtabliſhment of a cuſtom-houſe in Grenada.

And the jurors aforeſaid, upon their oaths aforeſaid, farther ſay That a custom-house was eſtabliſhed in the ſaid *iſland* of Gre nada, and proper officers appointed thereto.

The plaintiff, a natural born ſubject of the King of Great Britain, 3d of March, 1763, purchaſed a plantation in Grenada.

And the jurors aforeſaid, upon their oaths aforeſaid, farther ſa That the plaintiff, being a *natural born ſubject of the King o Great Britain*, on the third day of *March*, 1763, *purchaſed a cer tain plantation* in the ſaid iſland of Grenada, of the *French* inha bitants, in purſuance of the ſaid articles of capitulation, and of th ſaid treaty of peace, *as many other* Britiſh *ſubjects had then and ſinc have done.*

And certain ſugars of the plaintiff, of the growth of the ſaid iſland, ſubſequent to the granting and regiſtering of the letters patent of the 20th of July, 1764, were ſhipped off from thence; and the defendant, William Hall, being collector of the ſaid duty, received the monies mentioned to be had and received to the plaintiff's uſe, as and for the ſaid duty of four and an half per cent. impoſed by the ſaid letters patent, and hath paid them over to his Majeſty's uſe, but they remain in his hands, by the conſent of his Majeſty's attorney neral, for the purpoſe of trying this queſtion.

And the jurors aforeſaid, upon their oaths aforeſaid, farther ſa That certain ſugars of the plaintiff's, and of the growth and pro duce of the ſaid iſland of Grenada, and made from off the plain tiff's ſaid plantation there, subsequent to the granting and regi tering of the ſaid letters patent of the 20th of *July*, 1764, we exported from thence. And that the monies in the declar tion mentioned to be *had and received* by the *defendant* to the *plai tiff's uſe*, were *paid* to and received by the ſaid *William Hall*, in th ſaid iſland of Grenada, as aforeſaid, as and for the dut of four and an half *per cent.* imposed by the said lette patent of the 20th of *July*, 1764, he, the ſaid *William Ha* being then and there the collector of the ſaid duty, for t use of his Majesty. *And* that the ſaid *William Hall* hath *paid the ſame over to the uſe of his Majeſty*; *but*, on *notice* of *this a tion* intended to be brought, hath, by and with the *conſent* of h Majeſty's *attorney-general*, kept the ſame in his hands, *for the pu poſe of trying the queſtion ariſing upon the facts*; and for which th action is brought.

But whether the ſaid impoſt was lawful or not, the jury are ignorant, and pray the advice of the court.

But *whether upon the whole matter* aforeſaid, found by the ſa jurors, in manner aforeſaid, the ſaid impost or cuſtom of fo and one half *per cent.* in ſpecie, *for and upon all* dead commod ties of the growth or produce of the ſaid iſland of Grenada ſhi ped off for the ſame, was lawfully impoſed or not, the ſa jurors are altogether *ignorant*, and *pray* the advice of the cou in the premisses.

And if, upon the whole matter, the court be of opinion that the ſaid impoſt was not lawfully impoſed, then the ſaid jurors find for the plaintiff.

And if, upon the *whole matter* aforeſaid found by the ſaid jur in manner aforeſaid, *it ſhall appear to the court* here that the ſ impost or cuſtom of four and an half *per cent.* in ſpecie and upon all dead commodities of the growth or produce of the ſ

iſla

iſland of GRENADA ſhipped off from the ſame, was NOT LAWFULLY *impoſed*, THEN the ſaid jurors, upon their OATHS ſay, that the ſaid *William Hall* DID UNDERTAKE and PROMISE, *in manner and form* as the ſaid *Alexander Campbell*, by his ſaid declaration, hath declared againſt him; and they aſſeſs the DAMAGES of the ſaid *Alexander* on that occaſion, beſides his COSTS and charges laid out by him about his *ſuit* in this behalf, to 5*l.* and for ſuch *coſts* and charges 40*s.*

Damages 5l.
Coſts 40s.

BUT *if, upon the whole matter* found by the ſaid jurors, it appear to the court here, that the ſaid IMPOST or CUSTOM of four and a half *per cent.* in ſpecie of and upon all dead commodities of the growth or produce of the ſaid iſland of GRENADA, *ſhipped off from the ſame*, was LAWFULLY IMPOSED, THEN the ſaid jurors, upon their OATHS, ſay, THAT the ſaid *William Hall did not* PROMISE and UNDERTAKE *in manner and form as in his plea alledged.*

But if the court be of opinion the ſaid impoſt was lawful, then they find for the defendant quod non aſſumpſit, in manner and form as in his plea alledged.

This cauſe was firſt argued for the plaintiff by Mr. *Alleyne*, upon the above ſpecial verdict, in *Eaſter* term, 1774, in ſubſtance nearly to the effect following.

Mr. *Alleyne*—My Lords, if the wiſhes of government, or profeſſional rank, could influence the deciſions of this tribunal, I ſhould now, conſidering the cauſe, and the dignity of thoſe advocates who ſupport it againſt me, adopt the example of the *Roman* orator, and begin with recommending my client to the grace and protection of his judges; but experience having taught me that here the genuine merits of a cauſe are the judicial guide, I gladly follow the practice of an *Engliſh* court, where the laws are heard by their own recommendation, and riſe in humble confidence of counſel with the plaintiff, who, through me, ſolicits your Lordſhips juſtice in his behalf.

This long expected and truly intereſting cauſe now comes before the court upon a ſpecial verdict, found at the trial of the general iſſue before your Lordſhip, on an action of *indebitatus aſſumpſit*; *nominally*, indeed, brought for the recovery of an inconſiderable ſum of money; but *ſubſtantially*, to take the opinion of your Lordſhips upon a queſtion of the firſt magnitude. The verdict, when relieved from the embarraſſment of form, reſolves itſelf into the following CASE.

Action.

The conqueſt of the iſland of *Grenada*, in the *Weſt Indies*, was one among the many glorious atchievements of the laſt war, and was ſurrendered to the troops of his *Britannic* Majeſty, under general *Monckton*, on the ſeventh of *February*, 1762.

Caſe.
Surrender of Grenada to the Britiſh arms 7th of February, 1762.

By the articles of capitulation the inhabitants received as Britiſh ſubjects.

The articles under which it capitulated acknowledge the inhab
tants from thenceforth as *Britiſh* ſubjects; require them to take th
oath of allegiance, as a reciprocal duty reſulting from their adoptio
as ſuch; ſecure to them the enjoyment of their religion; aſſur
them of protection, in the ſame manner as the colonies receive it
with whom, by this ſurrender, and the conſequent reception int
the privileges of *Britiſh* ſubjects, they are placed upon an equal foo
in the poſſeſſion of the common liberty; and permit them to di
poſe of their own lands, provided it be to *Britiſh* ſubjects.

Abſolute ceſſion by the treaty of Paris, February 10, 1763.

On the general treaty of peace, ſigned at *Paris*, *February* the 10th
1763, this iſland was ceded by his Chriſtian Majeſty, in full righ
to the crown of *England*, under ſtipulations ſimilar to thoſe on whic
the province of *Canada* was ceded; and in general *confirmatory*
the articles of capitulation. And in this treaty his Majeſty engage
in the moſt ample manner, for the free exerciſe of the *Roman* catho
lic religion; and gives his *French* ſubjects liberty to ſell their good
and retire.

Proclamation of the 7th of October, 1763.

On the ſeventh of *October* following his Majeſty, to make goo
in the fulleſt manner, thoſe engagements, upon the faith of whic
the iſland had ſurrendered, and to perform at the ſame time the co
ditions of the treaty of peace, and farther, with a view to the be
ter peopling and cultivating of his ſaid iſland, was pleaſed to iſſ
his *royal proclamation*, inviting his *Britiſh* ſubjects to colonize in h
new acquired dominions, and, as an encouragement, aſſuring the
and the inhabitants in general already there, of the benefit of t
Engliſh laws and conſtitution: And, for that purpoſe, declares to th
effect; reciting that it will greatly contribute to the ſpeedy ſettli
of his ſaid new governments, that his loving ſubjects ſhould be i
formed of his paternal care for the ſecurity of thoſe in their liberti
and properties who were or ſhould become inhabitants thereof; a
farther, for the effectuating of ſuch intent, "We have thought
" to publiſh and declare by this our proclamation, that we have,
" our letters patent under our great ſeal of *Great Britain*, by whi
" the ſaid governments are *conſtituted*, given expreſs power and
" rection to our governors of our ſaid colonies reſpectively, that
" ſoon as the ſtate and circumſtances of the ſaid colonies will a
" mit, they ſhall, with the advice and conſent of the members
" our council, ſummon and call *general aſſemblies* within the
" governments reſpectively, in ſuch manner and form as in th
" colonies and provinces in *America* which are under our immedi
" government."

Having thus declared his reſolution to execute the engagement
their favour by this firſt ſtep, as early as poſſible, of calling aſſe
blies as in the colonies and provinces in *America*, under his parti

lar protection, and his inclination and deſire to manifeſt his paternal care of his ſubjects. He proceeds to ſhew the extent and juſtneſs of the accompliſhment of his deſign, by a full and particular declaration of the nature, powers and deſign of theſe aſſemblies when called, by adding: And we have alſo given power to the ſaid governors, with the conſent of our ſaid councils and the repreſentatives of the people ſo to be ſummoned as aforeſaid, to *make, conſtitute* and *appoint* LAWS, ſtatutes and ordinances, for the public peace, welfare and good government of our ſaid colonies, and of the people and inhabitants thereof, as near as may be agreeable to the laws of *England*. Here then they ſaw the full idea of their becoming *Britiſh* ſubjects which they did at the ſurrender, by this clear and perfect image of the beauty, order and freedom of the *Britiſh* conſtitution imparted to them, and to be the model and foundation of their own.

Powers of theſe aſſemblies to make laws.

But as it might happen that this benefit, thus pledged and confirmed to them, could not be immediately communicated in its full extent; his Majeſty provides thus in the mean time, and until ſuch aſſemblies can be called, all perſons inhabiting or reſorting to our ſaid colonies *may confide* in our royal protection, for *the enjoyment of the benefit of the laws of our realm of England*: So that the enjoyment of theſe laws was to anticipate even the calling of the aſſemblies, which was not to be a commencement of their freedom, nor of their exerciſe of the rights of *Britiſh* ſubjects, nor of their participation in the *Britiſh* conſtitution; but one act, moſt important and illuſtrious indeed, of that freedom, thoſe rights, and that conſtitution already in their poſſeſſion.

The calling of aſſemblies not the inchoation of their freedom, nor of the conſtitution; but an act reſulting from theſe already inherent in them as Britiſh ſubjects.

And it is material to conſider what is the firſt ſtep which the governor is to take upon his arrival in the iſland, for the purpoſe before expreſſed, of giving the inhabitants the benefit of the laws of *England*. It follows *immediately*, "*We have given power under our great ſeal to our governors of our ſaid colonies reſpectively, to erect and conſtitute, with the advice of our ſaid councils reſpectively,* COURTS of JUDICATURE, and *public juſtice within our ſaid colonies, for the hearing and determining all cauſes, as well criminal and civil, according to law and equity; and* AS NEAR AS MAY BE agreeable to the LAWS of ENGLAND."

For this purpoſe courts of judicature to be immediately erected, with powers conformable to thoſe of the laws of England.

Here then the laws of liberty and of *England* are enthroned in the iſland as ſoon as ever the delegate of the executive powers arrives there, and he is ſent to give them effect amongſt thoſe who were already entitled to them as *Britiſh* ſubjects, and both in criminal and civil cauſes, both in ſtrict law and liberal equity; in the whole, and in the great members and diſtinguiſhing diſtributions, both in the objects and the manner of applying them, the laws of our conſtitution, the laws of *England* are to prevail, and, as near as may be conſiſtent with local circumſtances, are to be enjoyed as th general privilege of *Britiſh* ſubjects, there as here.

Second proclamation of the 26th of March 1764, providing for the ſurvey and cultivation of the iſland, and for the neceſſary ſupport and defence of the iſland; previous to the introduction of the laws of England as to their actual exerciſe.

Conformably to theſe repeated acts, and in proſecution of th ſame intention, on the 26th of *March* 1764, a ſecond proclamatio was iſſued; having the ſame object the eſtabliſhment of the colonies, and declaring the ſame views already wiſely adopted, and firml engaged as to the means of attaining and perpetuating that eſtabliſhment; and reciting the great benefit which will ariſe to the commerce of the kingdom, and to his Majeſty's ſubjects in genera from a ſpeedy ſettlement of the new acquired iſlands, of whic this of *Grenada* is named the firſt. It gives directions for the ſurve of the lands, the diſtribution into diſtricts and *pariſhes*, analogou to the *Engliſh* diviſions, the culture of the various produce of th country, the apportionment of the ground into due lots for that purpoſe; and in general recognizes the inhabitants as his Majeſty' *loving ſubjects*, and provides ſuch means as were judged expedien for their neceſſary ſupport and defence, their internal order, plent and happineſs, previous to the completion of theſe by the enjoyment of the laws of *England*, which, as they had in right, they wer to have ſpeedily in poſſeſſion.

Patent 9th of April 1764, to Robert Melville, Eſq; conſtituting him Governor.

In further proſecution of this deſign on the 9th of *April* 1764 his Majeſty was pleaſed to grant his royal letters patent to Genera *Melville*, conſtituting him Captain-General and Governor of th new iſlands, *Grenada*, the *Grenadines*, *Dominica*, *St. Vincent*, an *Tobago*.

Commanding him to call the legiſlative aſſembly of repreſentatives.

This patent is ſet forth *verbatim* in the RECORD. In ſubſtance i provides for the good government of the ceded iſlands, gives directions to take and adminiſter the *oaths* of *allegiance* and ſupremacy gives authority to the governor, and requires and commands him t ſummon an aſſembly, deſcribes the manner of election by the freeholders, and thus called they are to ſit as repreſentatives; and together with the governor and council to be the *legiſlature* of the country, and to make laws as near as poſſible to the laws of *England* with the uſual proviſion that they ſhall be void if not allowed b his Majeſty within a limited time; and hereby is finally eſtabliſhed in *Grenada* a conſtitution, in principle and form, in the deſign of th whole, in the diſpoſition of the parts, in their reſpective function and joint operations, an exact epitome of the *Britiſh* form of government: Yet a conſtitution not given by the patent, but only t be put in full exerciſe.

Arrival of the Governor the 14th of December 1764; aſſembly called 1765.

With theſe powers his excellency arrived in *Grenada*, and inſtantl took upon himſelf the adminiſtration of the government; and i obedience to his commiſſion called an aſſembly and opened th ſcene of legiſlation in the year 1765.

On the 20th of *July* 1764, POSTERIOR in point of date to theſe PROCLAMATIONS and this PATENT, his Majeſty by his letters PATENT under the great ſeal, reciting an impoſt of four pounds and an half in ſpecie for every hundred weight of the commodities of the growth of the iſland of *Barbadoes*, and of the Leeward *Carribbee* iſlands, paid and payable to his Majeſty and his ſucceſſors; reciting the ceſſion of the iſland of *Grenada*, and that it is reaſonable and expedient that the like duties ſhould take place there as in the other ſugar iſlands, therefore in lieu of all cuſtoms and duties before paid by the inhabitants of the ſaid iſland to the *French*, on goods exported and imported, impoſes the above duty of four and an half *per cent.* and requires the governor and *officers* of the *cuſtoms* to raiſe, collect, and receive it to his Majeſty's uſe.

Patent poſterior in the date to the two patents already mentioned, and to the proclamation; by which patent the duty of four and an half per cent. is impoſed on every hundred weight exported from the iſland; and the governor and officers of the cuſtoms authoriſed and required to collect it.

Theſe letters patent were duly regiſtered and publickly announced by his excellency the governor in *Jan.* 1765. A cuſtom-houſe was erected, officers appointed to act as collectors of the cuſtoms, amongſt whom the defendant was one.

Regiſtery and promulgation of the above laſt mentioned letters patent Jan. 1765, cuſtom-houſe built, collectors appointed, the defendant one of them.

During theſe tranſactions ſeveral of his Majeſty's ſubjects, induced by the royal promiſes ſo frequently made, reſorted to *Grenada* and became purchaſers of lands therein. Amongſt the firſt of which was *Alexander Campbell*, Eſq; the preſent plaintiff; whoſe plantations ſucceeded, and he was about to ſhip off his ſugars from the iſland of *Grenada* to the *London* market, when he was interrupted by the defendant demanding this payment of the impoſt already ſtated: The jury find he paid it, and that the ſame is the money on which the action is brought: The verdict concludes in the proper form, and leaves to the court whether on the whole of the caſe the *impoſt* be *legal*.*

Many of his Majeſty's ſubjects in the mean while reſort to Grenada, under the aſſurances of the royal proclamation, and purchaſe lands there, and amongſt them the plaintiff. Payment of the impoſt by the plaintiff on demand: Concluſion of the verdict.

And my profeſſional duty now leads me to contend, that it was not competant to the crown on the 20th of *July* 1764, the day on which the patent for raiſing this impoſt is dated, to impoſe a permanent tax, as this, on the iſland of *Grenada*—of courſe that the preſent ſum in queſtion was improperly exacted; the money erroneouſly paid, or at leaſt without any legal obligation to pay it; and the plaintiff therefore entitled to your Lordſhip's judgment.

That at the time when this patent of the 20th of July 1764 is dated, ſuch impoſt was incompetent to the crown and illegal.

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* Lord *Mansfield* here reminded Mr. *Alleyne*, that he had omitted that part of the verdict which finds that the money is retained in the hands of the defendant, by conſent of the Attorney-General, in order to try the right. I only mention this, becauſe otherwiſe you could not have had your action againſt a cuſtom officer in this form.

As this claim is founded upon a ſuppoſition of royal prerogativ
which ought to be treated with deference and reſpect, it will be pe
haps convenient (before I make an eſſay which the importance o
the point renders an anxious one to me of diſcharging that duty) t
define what prerogative is, that I may be underſtood not to mak
any exceptions to it in general; nor to argue againſt an high an
beneficial privilege of the crown, and as I apprehend beneficial t
the people in what I conceive to be its true and proper ſenſe. Th
term is too often received with indignant jealouſy by an *Engliſh* au
dience from miſtaken notions of it, which were formerly ente
tained, and which have excited prejudices ſurviving, as is common
the particular cauſes which gave them riſe. To anticipate any ſuc
miſapprehenſions, I beg leave to offer this definition of prerogative

Prerogative.

in which, I truſt, I ſhall have your Lordſhip's ſupport: *Preroga*
tive is that portion of political power, which the conſtitution has in
*truſted with the crown for its own and the public honour and ſecurity.**

There are a few facts in this caſe which are introductory to th
direct point in argument, and thoſe therefore will merit a particula
notice and comment.

On the effect of the proclamation of the 7th of October 1763.

Firſt, the effect of the proclamation of the 7th of *October* 176
The ſubſtance of it is, a recital of the benefit naturally reſulting t
the *Britiſh* empire from a ſyſtem of colonization in *Grenada*; an
in order to invite the natural ſubjects of that country, on whom na
turally would be the firſt dependance, and by whom there was th
faireſt proſpect of anſwering this deſireable end;—to invite them t
ſettle there, it repeatedly aſſures them that a conſtitution as ſoon a
poſſible ſhall be formed in exact conformity and repreſentation o
the *Engliſh* government; whereby all powers of ſtate ſhould b
duly diſtributed, and lodged in hands competent to execute it to th
freedom of the ſubject and the ſecurity of the infant colony, by
full participation of our wiſe and admirable conſtitution. Then fo

Of that of the 26th of March 1764; and the patent of the 9th of April.

lows the proclamation of the 26th of *March* 1764, putting th
country in order, and preparing the face of it to rejoice as it wer
in the laws it was to receive; then follows the patent to Governo
Melville, with an immediate execution of theſe engagements, in par
by directing him to conſtitute courts of judicature, for the admini
ſtration of the whole internal policy of the country, as near as poſ
ſible to the laws of *England*; and to call aſſemblies as ſoon after a
was poſſible, in the very effigies of the *Engliſh* conſtitution, wit
the ſame powers, and to the ſame ends of public freedom, orde
and happineſs, and of maintaining a ſimilitude between the paren
ſtate and the colony.

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* Prærogativa eſt jus regis bonum et antiquum, in decus et tutamen regni, ſecundum bonas et antiquas populi libertates, et juris Anglicani leges et conſuetudines.

How wiſe, how politic the meaſure! for the crown at that time conqueror of *Grenada*, the old inhabitants ſubjected to the laws of conqueſt it might naturally be preſumed that *Britiſh* ſubjects would be jealous of ſuch a power, and diſinclined to ſettle where, under the circumſtances, not only a change of place, but a change of political relation might enſue. To remove theſe ſuſpicions if any yet remained—for his Majeſty, both by the terms under which his General had received the ſurrender, and by the ſtipulations of the treaty of peace, had given aſſurances of better things to the old inhabitants themſelves, with whom he had been at war; and had wiſely, and as became the honour of a King of *Great Britain*, diſclaimed to govern in the ſpirit of conqueſt when he had ſheathed the ſword.—But to give the fulleſt ſatisfaction to the inhabitants in general, and to thoſe particularly of his own ſubjects who ſhould be inclined to ſettle, the proclamation declares that all the inhabitants there, or who ſhould in future reſort thither ſhould have the full enjoyment of the laws of *England*. This conſtruction ariſes from the true meaning of the words, if any words of our language admit a definite ſenſe; it appears forwarded and enforced by the ſubſequent acts but now ſtated. And the neceſſary effect of this great and ſolemn inſtrument is a *waivure* of the rights of conqueſt whatever they were before. By the proclamation of 1763, in the moſt explicit terms a recognition is made, of the practicability of governing this iſland of *Grenada* by the laws of *England*, and a receiving of this ſometime conqueſt as an *Engliſh* colony; and, until I hear the contrary, a ſhort argument ſhall evince it.

Obſervations on their united tendency to ſupport and illuſtrate, and inforce each other; that the rights of conqueſt were waived by the proclamation of 1763; the practicability of governing Grenada by the laws of England, recognized by the power to the governor of appointing courts of judicature, on the plan of that law, and the iſland from a conqueſt received as a colony.

A conſtitution is promiſed; but that might be a work of time to complete and execute in actual operation. In the mean time however, courts of judicature are erected; they ſhall adminiſter, and the meaſure of this judicial conduct ſhall be the laws of *England*. Can this be compatible with any principle of conqueſt? Can the benefit of the laws of *England* be enjoyed, without laying aſide the government of a conqueror! Certainly no. The ſtrong hand of *power* enforces the laws of arms; the peaceful voice of law, ſecures the enjoyment of the rights of *Britiſh* ſubjects.

The benefit of the laws of England excludes government by the law of conqueſt.

The ſame obſervations will ſhew that the crown held it neither impracticable nor dangerous, to introduce the laws of *England*, and eſtabliſh freedom in this conquered country.

From the whole I argue, that the inhabitants of *Grenada* were conſidered as a COLONY annexed to the crown of *England*, and not to be governed by the laws of conqueſt; but on a plan ſimilar to that which iſſues from the common center, and pervades the whole ſyſtem of our *American* ſettlements.

That the inhabitants of Grenada were conſidered as a colony being ſettled, in a country annexed to the crown of England, and on the ſyſtem of the other American ſettlements.

If this be granted, and I ſee not how it can be queſtioned, conſiſtently with facts, I then conclude by direct and neceſſary inf rences from premiſſes which I think clear and uncontrovertible, th *every conſtitutional right* of the *Britiſh ſubject neceſſarily* belonge to them; they were entitled to call upon the crown to ſecure tho rights, and were competent by every legal means to defend tho rights.

If ſo, that every conſtitutional right of Britiſh ſubjects neceſſarily was theirs, and they were entitled to defend every ſuch right by every legal means.

Of courſe the crown could aſſume no *legiſlative* power ov them; could impoſe no *permanent tax*; for taxation at leaſt requir an act of legiſlation. Theſe obſervations, which would all reſul and I ſhould think irreſiſtibly, from the ſingle proclamation of t 7th of *October* 1763, receive additional force from the ſecond pr clamation, and from the patent to Mr. *Melville* to ſhew the ſa opinion in the royal mind, the ſame purpoſe, the ſame idea, a repeat the ſame aſſurances to the ſubject; and if it were poſſible make them clearer or more certain they would have this effe However, at leaſt they cannot weaken what was clear and certa before; they would ſtrengthen it, if it had need of ſtrength.

And that the crown had no legiſlative power over them, and of courſe no authority to inforce a permanent tax.

From them we get to the exact point of argument, "*whether t* "*crown, on the 20th of July* 1764, *poſſeſſed a legiſlative authori* "*over the iſland of* GRENADA."

The great general queſtion whether the crown on the 20th of July 1764, poſſeſſed a legiſlative authority over the iſland of Grenada?

The technical learning of *Weſtminſter-Hall* can give but little a ſiſtance in the inveſtigation of this queſtion. The great principl of the law of empire muſt determine it; to which the politic hiſtory of *England* affords particular illuſtrations.

That the technical learning of Weſtminſter-Hall will but little aſſiſt the enquiry which muſt be determined on the great principles of the law of empire, illuſtrated by the hiſtory England.

This courſe I ſhall purſue, and as I proceed glean up the lear ing to be found in the books; from which progreſs, I truſt, I ſha ſafely draw that concluſion, which forms the ground whereon m client now ſtands hoping ſucceſs, and I truſt, not hoping it in vai ſince I hope to prove he has on his behalf the moſt powerful adv cates, and moſt prevailing in this court, juſtice and right.

The principles of the law of empire are founded in the ſocial natu of man.—As *natural* law is derived from *natural* connections; political law is derived from ſocial connections. That conſiders hi as a creature as he came from his mother's hand; this as a me ber of ſociety paying obedience to the laws of his community, a reciprocally deriving protection from them.

The principles of the law of empire in the ſocial nature of man; and the reciprocal conformity of the individual to ſocial regulations and of thoſe to him.

From hence ariſes one inconteſtable principle—ſo long as he pays due obedience to the law, ſo long he is entitled to its ſecurity; provided he continue in a place where the exerciſe of that law is practicable; if he quit his native ſoil and reſort to a foreign ſtate, the municipal conſtitutions of his country being not the meaſure of his civil conduct there, protection for a while is *ſuſpended*, it intermits until his return.

If he reſort to a country newly acquired by arms though by his own ſtate there; if the neceſſity of the ſtate requires that ſuch country be governed by more rigourous means he muſt ſubmit to them: But if he reſort to a *newly diſcovered* country or colony, and ſettle there under the auſpices of the mother ſtate, there the laws of his original country ſtill afford their protection, as far as may be agreeable to the local circumſtances of that country to which he has arrived; ſtill meaſure his civil conduct: The executive magiſtrate ſhall frame a conſtitution for him to ſecure his birth-right, with every appendage of his antient government.

Change of community induces a change for the time of theſe municipal obligations, and ſo on coming to a country newly acquired by arms though of his own ſtate. But in a newly diſcovered country or colony, the laws of the mother ſtate as far as is compatible with the ſtate of the colony will ſubſiſt, and the rights derived under them to the coloniſts.

This neceſſarily follows from the principle I firſt propoſed;—and it is hardly neceſſary to reſort to an authority where reaſon is ſo clear: Yet, I am happy to refer to the illuſtrious name of *Vattell*, and fond of this occaſion of mentioning it with deſerved veneration, and I hope to be excuſed, if I indulge the pleaſure of quoting him, with ſome vanity perhaps, when I find my notions graced by his authority. In Q. 10. *ſec.* *B.* 1. Your Lordſhip will find him expreſſing himſelf in theſe words, "*when a nation takes poſſeſſion* "*of a diſtant country and ſettles a colony there, that country, though* "*ſeparated from the principal eſtabliſhment or mother country, naturally becomes a part of the ſtate, equally with its antient poſſeſſions.* "*Whenever therefore the political laws, or treaties, make no diſtinction between them, every thing ſaid of the territory of a nation ought* "*alſo to extend to its colonies.*"

Mr. Vattell of Neufchatel, B. 1. c. 18. p. 91. Lond. Ed. 1760 That a colony is become part of the ſtate from whence it iſſued, and has the ſame laws and privileges.

If therefore the political laws are coextenſive with the territory of the ſtate, however disjoined in ſpace, as this excellent author decides they are, then every conſtitutional right of the ſubject of that ſtate is co-extenſive; the fundamental laws of the ſtate equally ſo, and perſonal liberty and private property alike univerſally protected.

Inference that then the conſtitutional rights extend over the whole territories of a ſtate, and perſonal liberty and property alike protected.

This neceſſarily follows from his general poſition: But though I illuſtrate my argument by this quotation, I do not ſhelter myſelf under any foreign authority; nor merely under authority of what-

That reaſon affirms, a change of place can never of itſelf extinguiſh theſe rights; it may ſuſpend in ſome inſtances, but not in that of colonization.

ever growth: I appeal to the light of reaſon, that a change of place can never merely as ſuch operate a forfeiture of original ſocial rights. True, as I have before ſaid, it may ſometimes ſuſpend the enjoyment of theſe rights under peculiar circumſtances of policy; or make ſome of the laws of the parent ſtate inapplicable from difference of ſituation: But the mere act of *colonization* never can ſuſpend whilſt the operation of the law continues practicable; far leſs can it annihilate theſe rights.

Let us now, to cloſe this part of the argument, hear the legal authorities of our own country. We ſhall find the general learning of *Weſtminſter-Hall* coincide with this theory.

Caſes in ſupport of this propoſition, Blankard and Galdy 2 Salk. T. 5 W. & M. That the laws of England take place in a colony ipſo facto; in a conquered country, when declared by the conqueror.

In *Blankard* and *Galdy*, 2 *Salk.* 411. Lord *Holt*, Chief Juſtice ſays the reporter and the whole court with him held thus:

1ſt. *In caſe of an uninhabited country newly found out by Engliſh ſubjects; all laws in force in England are in force there.*

2d. *Jamaica* being *conquered*, and not pleaded to be parcel of the kingdom of *England*; the laws of *England* did not take place there, until declared ſo by the conqueror or his ſucceſſors.

The firſt point expreſsly maintains the propoſition of *Vattell*, and his Majeſty has put *Grenada* in expreſs terms upon the ſame footing with "the *other* colonies;" therefore all the laws of *England* (ſo far as is agreeable to that iſland) are in force there.

But further as a conquered country, the conqueror has *declared* that the inhabitants of *Grenada* ſhall enjoy the laws and conſtitution of *England*, which brings it within the ſecond point.

2 Peere. Williams 75. anno 1722.

Agreeable to this is what is reported by the maſter of the rolls in 2 *P. W.* 75. of a determination before the King in council, upon an appeal from the foreign plantations, that if there be a new and uninhabited country found out by *Engliſh* ſubjects, as the law is the *birth-right* of every ſubject, ſo wherever they go they carry their laws with them; and therefore ſuch new formed country is to be governed by the laws of *England*, then in being when they firſt ſettled.

As to the ſecond point it goes to be ſure on too large a ground in ſuppoſing conqueſt gives a *property* to the conqueror in the *people* conquered.

This principle is taken up by Mr. Juſtice *Blackſtone* in his commentaries, who allows the doctrine, and the exceptions to it which he makes in general ſuch as reſult from the inconvenience which would fall on the colony, from a general adoption of the laws of the parent ſtate.

Every day's experience before the council warrants this principle: The laws of deſcent and of all real property are current in *Ireland*, and in every plantation; in every part of the empire. By what law? By none poſitive there; but as a neceſſary conſequence of the country being a part of the *Britiſh* empire.

Mr. Campbell, at and before the date of the patent conſtituting the impoſt, was a Britiſh ſubject. The laws of Great Britain found practicable and expedient, and introduced by the executive magiſtrate.

If this be ſo, what was the ſituation of Mr. *Campbell* and his countrymen at and prior to the 20th of *July* 1764? They were *Britiſh ſubjects*: They were ſettled in a new acquiſition: The laws of *England* were practicable amongſt them: No peculiar circumſtances of policy required the ſuſpenſion of them. His Majeſty, the ſupreme executive magiſtrate of the ſtate, competent to decide on the propriety of introducing the laws of *England* into *Grenada*, has declared ſuch propriety; has introduced them. Then, by neceſſary conſequence, they were entitled to them; they wanted no other act to give it to them; and Mr. *Melville* was only to haſten in the performance of this duty to put their conſtitution in act, and ſecure their rights.

That after this, until the ſettlement of the conſtitution, his Majeſty could interpoſe at moſt temporary regulations, not a permanent tax.

By what mode of reaſoning then am I to learn that his Majeſty had at this time a legiſlative authority over the iſland of GRENADA? To make temporary regulations on a ſudden until all was finiſhed, was the extent of his prerogative; to impoſe a *permanent* tax was, as I ſubmit, *illegal*.

Argued, that the engagement is not executory.

This argument, founded on the evidence of facts, anticipates, I think, every objection that the patent to Mr. *Melville* was *executory*. It is againſt the words, againſt the ſpirit, againſt the great end of the proclamations to ſuppoſe it was. The court will not give ſuch a narrow and forced conſtruction to a public grant,* founded on the moſt liberal and wiſeſt principles of policy, and upon which numbers of *Britiſh* ſubjects have fixed their ſettlement, in confidence of all the rights of freedom in a country ſo remote; a conſtruction ill adapted to its terms, to its plain ſcope, and to the manifeſt reaſon of the thing if it had been a grant not to a nation at large, not to *Britiſh* ſubjects, to *Engliſhmen*, invited to ſettle for the encreaſe of commerce, but to a ſingle private individual under any circumſtances. Will the court intend that it was the deſign of the crown that *Britiſh* ſubjects, *Engliſhmen*, ſhould be called to croſs the Atlantic by the royal voice itſelf under ſuch aſſurances, and when they arrive find their hopes dependant on a future diſcretionary poſſible grant? It is ſufficient for me to ſay, by the patent, and by the proclamation of the 26th of *October*, nay, by the very terms of

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* It ſeems that in public grants, the rule of the civil law holds, which ſays—*Beneficium imperatoris quam pleniſſime interpretari debemus*, though our law adopts the contrary in private grants.

ſurrender and the general treaty of peace, the inhabitants are recog
nized as *Britiſh* ſubjects: The laws of *England* are recognized a
practicable and beneficial to the iſland, thoſe who were there an
thoſe ſhould afterwards reſort there are promiſed the enjoyment o
them. From that admiſſion, this mutual contract, and theſe acts o
the crown, I draw my argument, and thence derive the rights o
the colony to the full benefit of the *Engliſh* laws and conſtitution.

Arguments from hiſtory.

And now, my Lords, from the conſideration of the caſe in th
general view of political theory, and from ſuch authority as eminen
writers and the deciſions of our courts of law furniſh more directl
to the point, I proceed to the review of the hiſtory of this coun
try; and I truſt, that the account I ſhall give your Lordſhip of ou
ſeveral acquiſitions by conqueſt or colonization (in which latter con
queſt with us as with antient *Rome* hath always terminated) will abun
dantly prove the antiquity and uniformity of my general argument.

I have ſpared no pains to inform myſelf of the hiſtory of theſ
tranſactions; and, after a diligent reſearch through the writings o
Dr. *Leland* in his hiſtory of *Ireland*; of Sir *John Davies* in his diſco
veries, and the caſe of *Taniſtry* in his reports; of Dr. *Harris* in hi
Hibernia; and of Mr. *Molyneux* in his conteſt with Mr. *Carey*; an
laſtly of the noble hiſtorian of the age of *H.* 2. I truſt I am warranted in the principal facts and concluſions I have to offer concern
ing the hiſtory of the acquiſition of *Ireland*.

I ſhall not refer to the books by pages, except that in Sir *Joh*
Davies's reports, I would wiſh particularly to ſubmit to your Lord
ſhip's notice the 37th page B.

Anno 1154.

Ireland, when *Henry* 2. firſt aſcended the throne * of this king
dom, was divided into many ſmall ſtates, and was ſubject to a
thoſe evils and convulſions which diſtract ſavage unpolicied an
divided countries.

Dermot King of *Leinſter*, being driven from the throne by hi
rebellious ſubjects, ſolicited the aſſiſtance of *H.* 2. who, coverin
his ambition under the ſuppoſed ſanction of the papal authority,
and taking the conqueſt of *Ireland* to be a deſireable object, readil
permitted certain of his ſubjects, with Earl *Strongbow* at their head
to land in *Ireland*, and to engage in the enterprize on behalf o
Dermot.*

Anno 1171.

The ſtipulations were—in caſe of victory *Dermot* was to be re
ſtored; and in return a grant of lands was to be made to the *Engliſ*
ſubjects.

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* From Pope *Adrian* the 4th, whoſe name before his acceſſion to the ſee wa
Nicholas Breakſpear, and he himſelf was an *Engliſhman*. The letter authorizin
H. 2. to conquer *Ireland*, and bring it to the obedience of St. *Peter* is a very cu
rious one; it is dated 1154, and may be ſeen in Lord *Lyttelton*'s hiſtory.

The event was proſperous; the terms on the part of *Dermot* were fulfilled.

King *Henry* went over, and extending the conqueſt became poſſeſſed of a great part of the ſouth-eaſt of *Ireland*.

Anno 1772.

The natives whom he ſubdued he ruled with the *rod* of empire, communicating as he thought fit certain privileges, and withholding others; and making as he judged neceſſary certain regulations: But thoſe of his ſubjects whom he found ſettled there he recognized as ſuch; of theſe he demands the performance of the feodal ſervices; and, as a neceſſary conſequence of their being ſubject to the obligations of thoſe laws of *England* which were in force at their becoming a colony, the laws of *England* diffuſed their protection over the coloniſts: And he proceeds to ſecure the benefits of thoſe laws by perfecting their conſtitution, and forming their government with every appendage of *Engliſh* policy. We ſee him dividing the country into counties, eſtabliſhing ſheriffs, erecting courts of judicature, corporations and general aſſemblies.

The conquered part of Ireland governed with ſeverity, as by a conqueror.

The laws and conſtitution of England imparted to the coloniſts.

This account ſurely furniſhes an antient and illuſtrious inſtance to my general argument.

“The laws of *England* are communicated at pleaſure to the conquered natives; *but reſult to the Engliſh coloniſts as a neceſſary conſequent:*” This point is moſt elaborately diſcuſſed by Dr. *Leland*, decided by Sir *John Davies* in page 37; and adopted in the manner I ſtate it by Lord *Hale*, who remarks the colonies of the *Romans* planted in conquered countries obſerved the *Roman* law; and takes it as of courſe, not aſſigning any reaſon for it or explaining the manner; the reaſon being indeed the neceſſary nature of the thing. But he gives large explanations how conquered countries may have their laws changed.

The laws of England reſult neceſſarily to the coloniſts of England.

V. hiſtory of C. L c. 5. p 79.

I own the great authority of Lord *Hale* does not ſeem to agree with me on the whole in this account of the eſtabliſhment of the *Engliſh* law in *Ireland*, in the book juſt quoted: And I am aware too that this account is materially different from what Lord *Coke* lays down in his firſt Inſtitutes 141. *b.* and in *Calvin*'s caſe 7 *Rep.** as if they were eſtabliſhed by King *John*, and his ſon *Henry* 3. and farther were not the effect of colonization.

From page 1 to 28. Tr. 6 Jac. 1.

This ſtriking difference engaged me to trace the ſubject minutely; and as the learned writers whom I have followed had acceſs to the archives of the city of *Dublin*, and ſpent much time in every means of information, I chooſe to follow them as my leaders, in a point

Anſwer to the reaſons to the contrary.

of hiſtory which they had made the ſubject of their particular a tention, rather than the great oracle of the law,

The ſubſequent hiſtory is as follows—and will, by ſtating, ſhe how Lord *Coke* fell into his miſtake; for ſuch with deference I mu call it; and ſuch the facts I think prove it to have been.

That King John enforced, not originally gave the laws of England to the Iriſh.

Statuit et præcepit.

The laws of *H.* 2. being too much neglected from the intercour between the *Engliſh* colony and the native *Iriſh*, the latter obſtinately fond of that leud cuſtom, as it is called, the *Brehon* law, o which there is much ſaid in the caſe of *Taniſtry* already cited; an this law getting ground in the *Engliſh* eſtabliſhment, it was foun neceſſary in the reign of King *John* to iſſue a proclamation, com manding the due *obſervance* of the laws of *England* to his *Engli* ſubjects; and King *John* himſelf went over to *Ireland* to inforce obedience to them. And King *H.* the 3. his ſon ſpeaking of his father a having "ordained and commanded"* as Lord *Coke* takes it, but think more conſiſtently with hiſtory "*ſettled* and *required* the *obſervance*" of the laws of *England*, which had been already eſtabliſhed. The letter cited by Lord *Coke*, from whence too this quoted, ſays King *John* reduced them into *writing*, and at the *inſtance* of the *Iriſh*. It is very natural to admit this, without ſuppoſin either that King *John* was the original founder of thoſe laws i *Ireland*, or that they were not firſt there in conſequence of colonization. There was very little ſtatute law at that time; and i might be thought adviſeable by the adminiſtration here at that tim to digeſt the common law of *England* into writing, the better t avoid confounding it with the *Brehon* law; and probably at th requeſt not only of the *Engliſh* coloniſts; but of the wiſer an more moderate part of the *Iriſh* who had perceived it's excellence But however fond King *John* or his ſon might be, to ſuppoſe tha King *John* himſelf was the founder of theſe laws, (though I thin it does not appear that either have aſſerted ſo much) there is n ground from facts to deny this honour to King *Henry* the ſecond but, I think, abundant to the contrary: And at the ſame time think there is the ſtrongeſt evidence from facts and reaſon, not without ſupport from the expreſs declaration of great authorities, to prov that they were originally introduced not by conqueſt, but as righ attendant on *Britiſh* ſubjects ſettling there as a colony.

What is ſtated to have been done by King *John*, and is taken b Lord *Coke* as the indulgent act of that King, communicating th laws of *England* to the *Iriſh*, I take it was no more than a proclamation *enforcing* obedience to the laws *already eſtabliſhed*: A prerogative the crown may exerciſe this day at *London*.

Indeed the ſettlement which he reſtored was farther improve under King *John*'s reign, and enlarged in point of territory.

Th

The ſame policy prevailed in the ſubſequent reigns, and we find King *Edward* the firſt ſummoning members to the *Britiſh* parliament in the third year of his reign, for the purpoſe of taxing the colony. We find writs returnable into this court, the *aula regis*, and in every inſtance ſimilar protection and laws to the *Engliſh* and *Iriſh* ſubjects.

King E. 1. ſummoning members from Ireland to the Britiſh parliament for the purpoſe of taxing his Iriſh ſubjects

anno 1275. **Writs returnable in B. R. in England; ſimilar laws for the Engliſh and Iriſh ſubjects.**

No inſtance more ſimilar to the preſent caſe of *Grenada* can be conceived: And, ſurely, the politics of a crown infinitely more ardent to extend it's prerogative than the preſent times will allow ſhall not ſurpaſs, in affording protection to the ſubjects, the laws of this day.

Application to the caſe of Grenada, a multo fortiori, from the notion of prerogative in thoſe days.

The next inſtance we find in our political hiſtory is that of *Wales:* From it I ſhall derive ſtrong argument in ſupport of my general propoſition: And in this I am yet farther ſatisfied that I proceed upon ſolid ground, as I find the reſult of my enquiries to quadrate with the opinion of the court, delivered in the caſe of *the King and Cowle*.

Wales.

T. 32 & 33 G. 2. 4 Bur. 834.—64.

King *Edward* the firſt laid claim to *Wales*, as his feodal principality. The prince refuſing to acknowledge him he treated him as his *rebellious vaſſal*, reduced the country by arms, cauſed the prince to be puniſhed as a *traitor*, and took upon himſelf the immediate ſovereignty.

E. 1. claimed Wales as a feodal principality, anno 1283, in the 9th year of his reign.

He ſubjects them by arms; but, whatever was the real right, having ſubdued them, he recognizes them as his ſubjects (he could not, indeed, do otherwiſe upon the principle which he profeſſed, of reclaiming *Wales* as a feodatory ſtate, and declaring it, as he does in the twelfth year of his reign, to have been *before ſubject* to him of feodal right); he communicates to them the laws of *England*, and takes every meaſure to ſecure to them the benefit of the enjoyment of thoſe laws.

The hiſtory itſelf of thoſe times (many valuable collections of which are to be found in *Rymer Fœdera*) proves his conduct towards *Wales* not to have been as in right of a conqueror indulgently benefitting his ſubjects, but as the act of the feodal ſovereign, and at the ſame time ſupreme executive magiſtrate of this country, ſecuring to his ſubjects that protection which was their due, in return for their *feodal* homage and ſervices, and ſecuring it by a communication of the laws and conſtitution of *England*, conſidering *Wales* as under the general comprehenſion of the *Britiſh* empire.

And was a part of the ſame feodal dominion with England. V. Hale's Hiſ. of C. L. c. 7. p. 162.

So of Scotland, v. acta regia, from 83 to 91. This claim was made 10 May, anno 1291. V. alſo Hale's Hiſ. of the C. L. c. 10.

Purſuing his magnanimous deſign, of uniting all the adjacent countries to the realm of *England*, he next turned his thoughts to *Scotland:* And the hiſtory of the town of *Berwick*, ſo fully develloped by your Lordſhip in the caſe already cited, warrants the like obſervation as on *Wales*. He claimed *Scotland* expreſsly as ſovereign lord of the fief, and governed it as a part of the great general fief, th *Britiſh* empire.

E. 3. 8th of May, 1360, by which were ceded the provinces of Poictou, Saintoigne, Agenois, Perigord, Limouſin, Quercy, the pais of Bigorre, Gaure, Angouleſme, and the territory of Rovergne. Montreuil, Ponthieu, Calais, Guiſnes, and all the iſlands adjacent to the countries named Vide acta regia, 170.

The reign of *Edward* the third next furniſhes matter of a ſimila nature; and the ever memorable treaty of *Bretigny** gave that princ an opportunity of extending his empire upon principles which ha animated and directed his fore-runners.

I have not been leſs aſſiduous in examining the ſprings of his government over thoſe countries which were thus ceded to him.

I have purſued this enquiry chiefly through *Rymer*'s *Fœdera*, i which are preſerved all the ſtate papers from the treaty of *Bretigny* reſpecting the conduct of King *Edward* towards his dominions acquired from the crown of *France*; and from them it appears mo ſtrikingly how uniform he was in following thoſe principles of government which had been purſued by his predeceſſors *Henry* the ſecond and *Edward* the firſt.

Permit me, however, in this place, to mention the ſources fro whence I extract the hiſtory I am about to give. Beſides *Rymer* *D' Ewes journals*; *notitia parliamentaria*, *Co*. 4 *Inſt*. title *Calais*, th year book, 20 *H*. 6. 1 *R*. 3. and *Rot*. *Parl*. 50 *E*. 3.

As a preliminary obſervation, I would beg of your Lordſhip remember, that by much the greater part of the country, thus ced to King *Edward*, was claimed by him under a very different ti from that of an appendage to the crown of *England*.

So much as he claimed as in foreign right, this he erected into principality, and conferred it upon his illuſtrious ſon *Edward* t Black Prince, by the title of Prince of *Aquitaine*. To this, whi was much the greater part, he communicated a conſtitution tota different in form and principle from the *Engliſh* government, allo ing unbounded powers of ſovereignty to his ſon, and ſuch as t *Engliſh* nation could not have borne: But as theſe countries w claimed by the King, as Duke of *Normandy*, heir to the houſe *Anjou*, and to the crown of *France*, through his mother,* this tion did not concern itſelf what powers he aſſumed, with regard to countries which he did not hold or claim to hold as part of the realm of *England*; as the feodal ſovereign of thoſe he acted agreeably to their laws, and to the powers which they allowed their prince; the ſubjects of this country had no right to interfere.

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* Who was ſiſter to *Charles le Beau*, and upon *Edward*'s conſtruction of *Salique* law, as excluding females, but not the deſcendants of females, he entitled by deſcent through his mother *Iſabel* to the crown of *France*.

But with regard to *Calais* the caſe was different: *Calais* he had conquered as King of *England*; and, having turned the former inhabitants out of their poſſeſſion, he invites his own ſubjects of *England* to colonize therein.

Herein we find every principle of law adopted; the inhabitants participating in every ſecurity the *Engliſh* conſtitution affords: Writs of error returnable into this court; *members* repreſenting the people of *Calais* in the *Engliſh* parliament.

How ſtriking is this diſtinction! Over countries obtained by conqueſt, and claimed by a different title from that of King of *England*, he exerciſes an authority according to the title he claimed, very different from the authority of a King of *England:* Over the countries acquired to the crown of *England*, and inhabited by *Engliſh* ſubjects, he claims to himſelf no other power than the lawful prerogative of a King of *England*.

This lively diſtinction, firſt adopted by *H.* 2. and continued by *H.* 3. at this time prevails between any *American* plantation and the electorate of *Hanover*. To the former all prerogative writs will run, as to the counties palatine of *Cheſter* and *Durham*; over the latter what power has your Lordſhip, the great ſeal, or the parliament?

The ſame diſtinction between Hanover and the colonies.

The hiſtory of this country, then, as to the political government of the lands ceded by the treaty of *Bretigny*, joined with the laſt obſervation reſpecting *Hanover*, furniſhes additional proof to thoſe of *Ireland*, *Wales*, and *Scotland*, already mentioned, and encreaſes the weight of evidence from the experience of the nation corroborating this argument in a ſeries of ages.

Recapitulation of the evidence from theſe hiſtorical facts.

Hitherto, my Lord, I have endeavoured to penetrate pretty far into the ancient hiſtory of *England*, to which the nature of the queſtion directed me, as it depends on the law of empire, evidenced by hiſtorical facts; and as no evidence of this occurred to me ſo proper and unexceptionable on this occaſion as the hiſtory of our nation, in which I purpoſe to advance a ſtep farther yet: And here a modern edifice preſents itſelf to view, much worthy of obſervation, not only for the beauty and order of it's ſtructure, and the analogy of it's frame to the majeſtic fabric of our own ancient conſtitution, but particularly upon this occaſion; becauſe in all theſe reſpects an examination of it will contribute much, if I am not deceived, to a

The American colonies.

clear diſcernment of the merits of the preſent cauſe: The object t which I am alluding is the *American colonies*.

That they are built upon the foundation of our Engliſh conſtitution, and of the rights of it, inherent in Britiſh ſubjects, anterior to grant or charter.

America has been called, in a ſenſe totally different from what i meant by the ſame words when applied to *England*, the dominio of the *crown*. The *Americans* have been conſidered as a people o a different political ſpecies from the *Engliſh*; and have been calle *creatures* of the King. Their rights have been ſaid to have bee derived from their charters; and it is probable the miſapprehenſio of this particular has produced this very *cauſe*. Since it is the firſ in which the principles of colony law have been inveſtigated, it i my duty to ſtate thoſe principles very minutely, and endeavour t reſcue them from miſrepreſentation and miſtake.

The crown, by it's executive power, may execute any plan for the introduction or eſtabliſhment or maintenance of the laws of the conſtitution in any part of the empire, and it is a branch of it's truſt.

To do this I muſt beg leave to draw your Lordſhips attention t one great *leading* conſtitutional principle. *The crown by it's prerogative may execute any plan whereby the laws of the country may b promulgated or enforced, communicated or ſecured to the ſubjects of th empire.*

And the crown not only *may*, but it is a branch of the *executiv truſt*.

Thence proclamations, bodies corporate, tribunals of juſtice, counties palatine.

Founded on this principle, the right of iſſuing *proclamations*, o incorporating bodies politic, for the purpoſes of *municipal* juriſdiction, erecting *tribunals*, and conſtituting counties palatine, may ſtrik your Lordſhips; and certainly, on this principle, the *American* conſtitutions have been ſettled.

That the charters ſupport this idea, neither defining rights nor eſtabliſhing laws, nor giving directions, other than for the formal eſtabliſhment of the original laws of the parent ſtate.

There is not a ſingle clauſe in any charter which can impugn thi idea; but every part of them holds out the moſt concluſive evidenc of their being *legal* acts of prerogative, for the purpoſe of ſecurin *conſtitutional rights* to our fellow ſubjects in diſtant parts of the empire.

The charters do not *define* rights, nor eſtabliſh *laws*, nor give any other directions than merely for the formal eſtabliſhment of an internal legiſlature and government.

Why, then, ſhall it be argued that the rights of the colonies are emanations of the royal bounty? Not a ſingle conſtitutional right i *granted* by *charter*; and yet *every* conſtitutional right is *admitted* t be the *birth-right* of the *Americans*. The idea of the contrary i too frivolous to be argued in this place; and perhaps my contending againſt it was therefore unneceſſary.

General deduction.

In general I conclude, and propoſe it as a great *conſtitutional* truth, *that the* American *charters and patents are accommodated to protect the anterior rights of the coloniſts, and not to convey thoſe rights, as dependent on thoſe charters, and derivative from them.*

The three ſpecies of colony governments.

The colonies in *America*, it is well known, fall under a threefold deſcription; firſt, *proprietary grants*, as *Pennſylvania* and *Maryland*; ſecond, *charter governments*, as the *Maſſachuſet's Bay*; third, *provincial eſtabliſhments*, as *Carolina* and moſt others. In original principle the government is in all the *ſame*, though ſomewhat different in external form.

Proprietary grants aſſimilated to counties palatine. Second to municipal corporations.

The firſt ſort may be aſſimilated to counties palatine, the ſecond to municipal corporations, the third ſort are a ſpecies by themſelves, as to their external conſtitution; all, however, flow from the principle I ſtated; all tend to ſecure to the ſubject the enjoyment of the laws of *England*; all, in the very nature of their eſtabliſhments, ſhew that the rights of the colonies are *inherent and innate*, not *derivative*, or *communicated* by charter.

But here I expect I ſhall be told that the cleareſt argument poſſible will rebut me. The objection, if it ſhall be made, has the ſound of ſomething material, and therefore, rather than to be thought either to have overlooked it, or to have feared it more than I can perſuade myſelf I ought, I will now offer to meet it.

Appeal to the King in council.

It is certain that in the early charters granted to *America* the King reſerves to himſelf an *appeal* to him in council, in the laſt reſort; and from hence the ultimate judicature has been uſually underſtood to be in the King *perſonally*, and not as in right of the *crown* of *England*, nor through his courts, as to *Britiſh* ſubjects. From this circumſtance, I ſuppoſe, it will be contended that the King is Sovereign of *America*, not as King of *England*, but *perſonally*; and the colonies are not governed by laws like *Ireland*, *Wales*, and *Berwick*, derived to the inhabitants in conſequence of their being ſubjects of the *Britiſh* empire; but are like to *Jerſey* and *Guernſey*, which belong to the *king*, and not to the *crown*. Hence the argument would be, that all the colonies of *America* are dependent on the king, not as head of the general conſtitution, but in a very different relation, and my general principle would be much affected.

To obviate all this, I need only deſire it to be remembered that ſuch a circumſtance cannot alter *conſtitutional law*, or the *principles* of the *law of empire*; not even if it ſtood clear and unimpeached by that which I conceive will moſt completely reprobate it, the extreme art with which it was introduced into the charters, and the prevailing policy of the times when it was firſt conceived; I mean the policy of King *James* the firſt.

It is not in the firſt charter.

That it proceeded from the particular notion of King James.

The firſt charter was granted to the *Virginian* adventurers, i which this reſervation does not appear. In all the other charters i certainly does; and this is owing, I apprehend, to the extreme anxiety o *James*, whoſe favourite idea it was, from the firſt moment in which he aſcended the throne, to conſider every part of the *Britiſh* empire, not immediately within the actual limits of *England* in reſpect o local ſituation, as holden of *himſelf*, *and not as component members o* *one* great empire, at the head of which he ſtood as ſovereign, in right of the crown of *England*, therein directly inverting the principles and practice of *H.* 2. *Ed.* 1. *Ed.* 3. and other princes, hi predeceſſors.

To prove this there are many remarkable paſſages in the hiſtory of thoſe times. The firſt is mentioned by Lord *Vaughan*, as being communicated to him by the great Mr. *Selden*.

King *James* aſked Mr. *Selden*, whether *Ireland* (at that time, as your Lordſhips know, the ſubject of much political ſpeculation) might not be conſidered as belonging to him *perſonally*, as the *heir* of the conqueror thereof; that the lands therein might be taken to be his own, and the *Iriſh* themſelves as ſubjugated to the laws of conqueſt, and of courſe not entitled to the rights of *Engliſhmen*, nor to be conſidered as members of the ſame community, but dependent on his will, and beholden to his indulgence?

L. Vaughan's opinion to the contrary of King James's. Vaughan's Rep. p. 402.

Mr. *Selden*'s opinion will be mentioned by and by: It is not reported in *Vaughan*, but that learned judge himſelf there decide againſt the King; "That it *cannot* be *reaſonable* to make the ſuperiority only of the *king* and not of the *crown* of *England*." In the caſe of proceſs into *Wales* my Lord *Vaughan* uſes this expreſſion; and adds, the practice has always accordingly, as, ſays he, is familiarly known by reverſal or affirmance of judgments given in the King's Bench in *Ireland* in the King's Bench here; which, he continues, is enough to prove the law to be ſo in other ſubordinate dominions.

Craw *and* Ramſay. H. 21 & 22 Car. 2. C. B. Vaughan, 278. V. p. 401. 2 Vent. 1 c.

And in the caſe of *Craw* and *Ramſay*, it is decided that *Irelan* and the plantations are holden of the *crown* as the ſovereign of the *Britiſh* empire; and the like diſtinction which I took before between *Anjou* and *Calais* is made by the Lord Chief Juſtice. The ſame caſe is reported in *Ventris*.

But, to return to King *James*: Another remarkable anecdote o his notions of government, to the ſame point, is to be found in the journal journals of the houſe of commons. It occurs in many places, but particularly in the journal of the 25th of *April* 1621.

Journal of H. of C. 25 Apr. 1621.

A bill was brought into parliament for the liberty of a *free* fiſhery on the banks of *America*, at that time in general called *Newfoundland*.

Inſtance where the parliament would not ſuffer the private grant of the King to exclude the other ſubjects of Great Britain from a common ſhare in the Newfoundland fiſhery.

Government ſeemed extremely unwilling to ſuffer parliament to meddle. Says Mr. Secretary—I take it from the journals—"What "have we to do with *America?* They are *plantations*; they belong "to the King." But good old Sir *Edward Coke*, Mr. *Selden*, Mr. *Brooke*, and other great men, reply indignantly, What! when the King grants letters patent to them under the great ſeal are they not part of the empire, and ſhall not we interfere?

Theſe obſervations ſhew the prevailing policy of thoſe times. And are we, then, to wonder that the right of ultimate judicature ſhould be claimed by the King, and that he ſhould artfully introduce into charters a *reſervation* of it. A reſervation indeed ſuperfluous if there had been ſuch a right in the King perſonally; and of no effect if there was no ſuch right; for then the reſervation could not create it, contrary to the principles of the conſtitution.* We ſee what Mr. *Selden*, what the parliament at that time thought of it; what Lord *Vaughan* afterwards; what the practice of ſome of the greateſt antecedent Kings; what the doctrine of the books; what the experience of nations; what the teſtimony of ages; what reaſon itſelf ſpeaks, all concurring that all the parts of the *Britiſh* empire are under *one* conſtitution, and have all the rights and immunities which reſult from that conſtitution. The intrigues, therefore, of King *James* muſt not weigh againſt natural reaſon, political theory, legal authority, and the principles of the conſtitution.§ The gentlemen who firſt went to the *American* ſettlements, in ages when the principles of political theory were ſcarcely known to the moſt refined, might not foreſee the tendency, and therefore unwittingly ſubmit to this claim of King *James*. But on any conſideration, knowingly or unknowingly, they could make no conceſſion to the prejudice not only of their conſtitution, but with it of ours.

If ever that queſtion, of the relevancy of a writ of error from any ſettlement of the weſtern world, ſhall come into litigation in this court, and it fall to my part to argue it, I hope I ſhall then know my duty, and what to ſay upon it. I hope I ſhall prove that the juriſdiction of the King in *council*, as the *ultimate* judicature, is *unconſtitutional* and

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* Reſervatio ut et proteſtatio non facit jus ſed tuetur.

§ Nemini licet quod non per leges licet.

void; but if the experience of a century and an half ſhall be ther held to outweigh arguments founded in principle, your Lordſhip will ſay, "The experience ſupports though the principle denies it," and will take care that neither then nor now it ſhall be carried farther, and argue from a peculiar judicial authority, upon whatever ground ſupported however by *precedent* if ſupported, to a legiſlative authority ſupported by *no precedents*; and, I beg leave to ſubmit, not warranted by the *principles* of the *conſtitution*. To meet, however, the concluſion which might be attempted to be drawn from this claim o ultimate judicature in council, I have been drawn inſenſibly into thi length of diſcuſſion—The occaſion muſt be my apology.

General recapitulation and concluſion.

I return now to conclude with the immediate point before th court. And in this, on whatever ground I conſider this cauſe, whether in the general view of reaſon and experience, the opinion o eminent writers of foreign nations; the learning of our books; th principles of the law of empire; the hiſtory and experience of thi country for ages; whether as to this particular iſland of *Grenada*, o the terms of the ſurrender, the treaty of peace, or more eſpeciall the proclamations and patents; whether on the great principles o our conſtitution, or the principles of natural juſtice and equity; o all, on any, on every ground I draw this concluſion, that on th 20th of *July*, 1764, his Majeſty was in no wiſe entitled, by the prerogative of the crown of *England*, to impoſe the duty of four an an half *per cent.* in manner and form as is laid in the declaration admitted by the defendant's plea, and found by the verdict: Suc being an act of *legiſlation*, and repugnant to the principles of tha government to which the inhabitants of that iſland were at that tim entitled, and which belonged particularly to Mr. *Campbell*, the plaintiff, a natural born ſubject of the crown of *Great Britain*, found ſ and declared by the verdict, and were his by every right, ſecure to him by every ſanction.

And while I have thus contended, and I hope eſtabliſhed my client's intereſt, I further truſt that this general review of our conſtitution, and of the hiſtory of our country, crowned by the deciſio of this court, will warrant me in ſaying of *Britain* what the *Roma* orator boaſts of *Rome*: ALIAE NATIONES SELVITUTEM PAT POSSUNT; POPULI ROMANI PROPRIA LIBERTAS.*

Ciceronis Philip. 6ta.

Mr. *Wallace*, for the defendant—The queſtion upon the ſpecia verdict is, whether the impoſt or cuſtom of four and an half upo the exports of the iſland, in the manner found by the verdict, wa under the circumſtances in which that iſland then ſtood, at the tim of the impoſt, duly and legally impoſed by the crown, or not?

Mr. *Alleyne* not having gone into the diſpute of the authority an prerogative of the crown at any time to make proclamations, bu

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examining the nature of *this*, and contending that, whatever might be the ſtate of the iſland before that period, it was incompetent to the King from *that* time to give any laws whatever to the iſland of *Grenada*, (for if any, there is no doubt of taxation) this has relieved me from laying before your Lordſhips the rights of a King of this country over a conquered country.

That the ground of the proclamation having waived any antecedent rights, makes it not ſo neceſſary to conſider the rights of conqueſt: But otherwiſe that conqueſt carries with it a legiſlative authority.

What thoſe rights are is a principle not only of the law of nations, but has been recognized wherever it came under conſideration, even by the judges of this country; by acts of ſtate, and hiſtorians; and, in one great inſtance, declared by all the judges. In *Calvin*'s caſe it is recognized that the rights of conqueſt do belong to the King: And the rights of conqueſt are in that caſe extended farther than I wiſh they ſhould be underſtood; but thus much, I take it, they *neceſſarily* give, a *legiſlative* authority. It is not now as formerly, that the conquerors gain captives and ſlaves, and abſolute dominion, but now the conqueror obtains a juſt dominion, under due reſtrictions, and inſtead of *ſlaves* he acquires *ſubjects*. Not a *propriety*, as in *goods*, but an *authority*, as over men, *reaſonable* and *ſtill free*.

The effect of the letters patent is not to alter the condition of the iſland: It is only to raiſe certain duties raiſed there by the *French* King, and paid to the King of *England* by the iſland of *Barbadoes* and the other Leeward iſlands; but the only thing is, this is done *July*, 1764, when it ſhould have been *October*, 1763, or thereabouts.

[Lord *Mansfield*—It was *after* the *proclamation* and commiſſion; for, I think, the proclamation was in *October*, 1763; the commiſſion in *April*, 1764; and this is in *July*: So it is after both.]

Mr. *Wallace* continued—The patent is carried out by the governor. At the time he takes upon him the office of governor he promulges this tax: His firſt office as governor is to promulge it. Now the queſtion is, whether the King, by this proclamation, meant *immediately* to waive the rights he had as conqueror of the iſland, or at a *future* period, when the ſtate and circumſtances of the iſland would admit of a legiſlature: When that would be was very uncertain. In fact, it does not appear that the firſt aſſembly met earlier than the latter end of the year 1765, (about a year and an half from the date of letters patent) nor does the verdict find that an aſſembly could have met ſooner.

That the governor took the patent impoſing the tax with him, and therefore it muſt be taken that it ſhould be impoſed previous to calling an aſſembly.

The proclamation begins with a general direction to his Majeſty's four governments, by name of *Quebec*, *Eaſt Florida*, *Weſt Florida*, and *Grenada*. Then the aſſembly of *Grenada*, as to that part of the proclamation upon which this caſe turns, is to meet "*as ſoon* "*as the ſtate and circumſtances of the iſland will admit.*" Is it conceivable that in the mean while the King meant to diveſt himſelf o his right of legiſlation? There is no ſuch *declaration*; it is *impoſſible* there can be ſuch a *conſtruction*.

If the King had not continued a right of making laws before the period of their having a legiſlature of their own, who was the legiſlator? Here is no relinquiſhment on the part of the crown in the mean while; but when an aſſembly meets the crown will hand over the powers of legiſlation to that aſſembly.

It is neceſſary in theſe diſtant countries to provide legiſlative conſtitutions within themſelves, when circumſtances will admit; they cannot be governed by ordinances or acts of parliament made fo all caſes and inſtances whatever. The beſt judges what laws are neceſſary and proper for the peace, tranquility, and good order o the iſland, are the perſons locally reſident; therefore it is neceſſary ſome legiſlature of this kind ſhould be eſtabliſhed: But till it be, o neceſſity, every order of the King muſt be obſerved by the governo and the people.

But Mr. *Alleyne* has ſaid the King has *waived* the right of conqueſt, by introducing courts of judicature; and that it is a part o the benefit of the introduction of the laws of *England*, that all th laws of the country not agreeable to theſe muſt be abrogated.

It is not uſual in theſe times to take conquered nations under protection upon theſe terms: And as it is unuſual, ſo I find, in th opinion of *Grotius*, it would rather be harſh and rigorous than indulgent. Your Lordſhip will remember that he ſays it is uſual t ſuffer the inhabitants of a country conquered to poſſeſs their *own* laws, unleſs they are abſolutely neceſſary to be abrogated, for th ſecurity of the conquering ſtate. And ſimilar is the opinion of *Puffendorff*.

That the introduction of the Engliſh laws would make great confuſion of property.

Would it be for the ſecurity of the conquering ſtate to introduc ſo dangerous, ſo total, ſo unneceſſary a change; to alter the whol courſe of their law of property, by introducing the law of *Englan* to them, a peculiar law of deſcent, differing from all other; intricat and complex modes of conveyance; a new foreign unknown law it's very language unknown to them; by which thoſe rights whic have been the ſubject of contract muſt be deveſted; owners under fair title diſpoſſeſſed of their eſtates; ſettlements in conſideration o marriage overthrown, for want of the forms eſſentially required i our law.

I conceive nothing more can be meant than that *civil* and *criminal juſtice* according to the laws of *England* were to be introduced, for the puniſhment of public offences, and the redreſs of private wrongs; and as far as might be for the prevention of both, in which the mode of trial, of conviction, and the whole legal proceſs, is the common benefit to all.*

That no more can be meant than that civil and criminal juſtice was to be eſtabliſhed according to the laws of England for the good order of the ſtate.

The *lenity* and *excellence* of our *criminal* laws is *known* throughout the world: More had been *burthenſome*; theſe were *expedient* and *neceſſary*.

Mr. *Alleyne* has compared the ſituation of this country with the other dependencies of the crown, particularly with *Ireland*.

It is true my Lord *Coke* held an idea of the laws of *Ireland* being eſtabliſhed there by an *Iriſh* parliament, but in this he was ſingular; nor do I think the idea of their having been eſtabliſhed there through the medium of an *Engliſh* colony is leſs uncommon, or promiſes more ſucceſs.

In *Calvin*'s caſe, before the chancellor, and all the judges, the caſe of *Ireland* is put as one of the conquered countries, and the title of *Henry* the ſecond was accordingly King of *England*, and *Lord of Ireland, &c.* diſtinguiſhing between the title by right of conqueſt and his title as King of *England*. And King *John* gave them laws as a conqueror, and not by act of parliament, and this plainly appears in *Ventris*, in the caſe cited by Mr. *Alleyne*, where it is expreſsly laid down, on the authority of three of the judges, that *Ireland* was a conquered country, and in King *Henry*'s time remained governed by it's own laws, and ſo continued till his ſucceſſor, King *John*, in the twelfth year of his reign, by *charter*, and not by act of parliament, introduced the *Engliſh* laws.

That King John gave laws to Ireland as a conqueror. V. Calv. caſe 23. Sed v. Tyrrel Juſtice contra in that caſe.

But if your Lordſhip had found that even by act of parliament the laws of *England* had been introduced into *Ireland*, would the leaſt inference have followed that the King alone, by his *legiſlative* authority over a conquered country, could not have introduced them, or others, if he had ſeen expedient.

Neither *Wales* nor *Berwick upon Tweed* do, as I conceive, apply to the preſent queſtion. They were not pretended to be holden in right of conqueſt, but as immediate fiefs under the crown of *England*, on the terms of the ſame feodal protection and obedience by which *England* itſelf was then held, and as members re-united to the en-

Wales and Berwick diſtinguiſhed from Grenada, being claimed as parts re-united to the crown of England.

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* Lex Angliæ eſt lex miſericordiæ.

tire original fief; for that was the claim, whatever was the fac
Nothing like this can be dreamed concerning *Grenada*; no depen
dance on *England* or *Great Britain* till the late conqueſt. And b
all the difference between what is claimed as a re-union and wha
can only be claimed as a new acquiſition, by right of arms, the ca
ſes differ.

The colonies diſtinguiſhed, as being ſettled in uninhabited countries.

Indeed, not relying on this, it has been thought neceſſary to en
deavour a compariſon between the caſe of this iſland of GRENADA
and the *American colonies*, of which, in general, the riſe is known
to have been from new diſcoveries of uninhabited countries, in which
the diſcoverers were encouraged to ſettle by charter from the crown.
No pretence of conqueſt: They could not live without laws; they
could find no laws in an uninhabited country; what laws ſhould
they have, then, but the laws of *England*?

That in a country already ſettled with different laws the Engliſh laws cannot enter as into a vacant poſſeſſion.

But is this the caſe of a country already ſettled, where they find
a people and laws? Will the laws of *England* expel thoſe laws al
ready eſtabliſhed, fitted to the circumſtances of the place, known
and familiar to the inhabitants, to paſs themſelves into a country
where they will be ſtrangers, and for which they are not locally
adapted?

Is it poſſible that *Britiſh* ſubjects, coming into a country where
there are other laws, ſhould carry the *Britiſh* laws with them thi
ther, and not be governed by the laws of the country to which they
are gone? Can it be ſuppoſed of a *Britiſh* ſubject going to *Hanover*, for inſtance?

That the appellant juriſdiction reſerved to the King in council has never been called in queſtion till now.

As to the circumſtance of an appeal to the King in council, as I
do not think it neceſſary to lay any particular ſtreſs upon it, it may
ſuffice to ſay, when the crown granted the charters under which the
ſettlements were made, it was competent to the crown to preſcribe
the mode of appeal, which, in ſome form or other, by the royal
prerogative, and for the benefit of the ſubject, neceſſarily lay in all
the variety of diſputes concerning the rights of the colonies. Narrowly as prerogative has been looked into, never has this branch
been queſtioned, as not legal and conſtitutional.

When a writ of error ſhall be brought before this court, to reverſe a judgment given in the colonies, or a re-hearing moved, or, by what name ſhall I call it, to examine in this court a decree in council, then will be the proper time for this queſtion; but I believe that time will never arrive. They will look to that juriſdiction as they always have done: They will find that redreſs which never yet has failed them. It would be a conſiderable acquiſition to the buſineſs of this court if your Lordſhip were to ſit here to exerciſe that appellant juriſdiction upon writ of error from the plantations, or in whatever form, for the practice is unknown to our books as much as the theory was to me till this day, in which ſo much ingenuity and argument has been employed to raiſe it.

And here I cannot help obſerving, that it is a great change in the language of *America* to inſiſt as they have done, and do, that the parliament of *England* has no right to tax them, but that they derive their conſtitution from the King only; and now to ſay, in this cauſe, that the King has no power over them but as the head of the *Briti*ſ*h* conſtitution.

But in this caſe, if the King by conqueſt had a legiſlative authority over GRENADA till the aſſembly could be called, he has *waived* it. It is not ſaid he has *parted* with it, (for how could it, when there was no body to take it) but he has *waived* the right.

That the King did not waive his right of legiſlation over the conquered iſland of Grenada till an aſſembly could be called; for that in the mean while it could not be out of the King, the body into which it was to be tranſmitted not being in eſſe.

I own, by what I can underſtand of the books, I have no idea of the poſſibility of the CROWN *waiving* a right. It muſt be more or nothing; it muſt be *transferred* to ſomebody elſe, or it *remains* in the crown; for in the crown there is no laches, no negligent abandonment, leaſt of all in ſuch a point as this, ſo eſſential to order and good government.

But, not excepting to the mere term, at what period, to whom? To the aſſembly if to any body, for that is the condition of the grant. That when the ſtate and circumſtances of the iſland ſhall admit the calling of an aſſembly they ſhall be called, and ſhall meet and make laws; in conſequence of which legiſlative power tranſmitted to them by the crown, and to be exerciſed by them, the King will *then* depart from his right of taxing them by his ſole prerogative without an aſſembly. But this aſſembly did not meet till *after* the patent to the governor for raiſing this impoſt; they were, therefore, liable to the impoſt; and it was *eſtabliſhed* by the *proper* and *only* authority *then* in the iſland long before the aſſembly *did* or *could* meet.

I truſt, therefore, the court will think, from the principles of reaſon and juſtice, that the proclamation for calling an aſſembly *was*, both in the *words and* intent of it, and in the *neceſſity* of the thing, *executory*; that the duty of four and an half *per cent*. was not *executory*, but *immediate*, and by legal authority, by virtue of the patent. And that it could not be meant that the calling of the aſſembly, under the authority and by the voluntary grant of the crown, ſhould defeat the duty firſt *legally* impoſed by the *ſame* authority, and therefore that the plaintiff is not entitled.

That the proclamation was executory, and the impoſt veſted as it were in the mean while by the patent.

Replication.

Mr. *Alleyne*, in reply—It is not to be wondered that I ſhould hav expreſſed myſelf inaccurately; but ſo I certainly muſt, ſince I appea to be ſo much miſunderſtood by Mr. *Wallace*; the whole tenor o whoſe argument has been calculated to meet a ſuppoſed idea of mine that the laws of *England* were introduced into GRENADA ſolely b the proclamation of 1763. This was by no means the object of m argument.

That the proclamation recognized rights of Britiſh ſubjects, and provided for the execution of them.

That Britiſh ſubjects recognized as a colony have all the rights of the original conſtitution.

I contended that the proclamation was a *recognition* of the righ of the inhabitants of GRENADA, as *Britiſh* ſubjects, to be governe by the laws and conſtitution of *England*; of the practicability o reducing that right to practice, and the reſolution of bringing in al it's parts into actual execution as ſoon as poſſible: Therefore I cite the caſe of *Ireland*, and upon authorities, I hope, of more weigh at this day, than *Calvin*'s caſe: And I did infer that *Britiſh* ſubjects ſettling in a conquered country, conquered by the arms of a Kin of *Great Britain*, carried with them their own laws and privileges and that the moment the crown recognizes a colony of *Britiſh* ſubjects to have been ſettled, from that inſtant it engages it's authority for ſecuring to them all the rights and exemptions belonging to tha character. And I thought I had proved that the practice of th crown had been conformable to this principle.

That if anterior to the proclamation the crown had a legiſlative authority over the inhabitants and Britiſh ſubjects reſorting to Grenada, that authority was renounced and given away by the proclamation.

But, to meet Mr. *Wallace* upon his own ground, who aſked ſuppoſing the crown entitled to exerciſe taxation over the inhabitant of *Grenada*, who were there, or ſhould reſort thither, indiſcriminately, by right of conqueſt, how the crown had *parted* with thi right, I acknowledge not properly *waived* it? I anſwer, let us ſuppoſe for a moment that, *anterior* to the *proclamation*, the crown, a *conqueror*, had a power to raiſe a *permanent* tax on the *then* and *future* inhabitants of GRENADA; and had the *vitæ neciſque poteſtas* the *legiſlative* authority in the fulleſt ſenſe, when the crown *declare* they ſhall have a *legiſlation* of their *own*, and *in the mean while* b governed by the *laws* of *England*, I contend from that moment th King had parted with the right, ſuppoſing he had that right till the of impoſing upon them himſelf, by his ſole authority, a *permanen* tax. And I contend that the patent to Governor *Melville* repeate and enforced the grant, taking it as ſuch for the preſent, in the mo ſolemn manner.

In vain would it be argued that theſe grants of the laws of *England* were executory, and therefore might be *ſuſpended*: Proclamations and patents ſuch as theſe are not of ſuch a flimzy nature, to b ſuſpended, that is, virtually repealed, to be granted to-day, and reſumed to-morrow. And if this cannot be denied, then the *Engliſ* laws were the laws of *Grenada*, either by prior right, or, as I hav been willing to argue, ſince Mr. *Wallace* has laid ſo much ſtreſs up on the executory nature of the proclamation, by *actual*, *immediate* grant. And there is no one principle of *Engliſh* more decidedly clear than that the crown cannot, by it's *ſole* prerogative, enact a law.

That principles of equity, from the conſideration of the other iſlands, would not maintain the impoſt upon Grenada, becauſe this is under claim of prerogative, thoſe by act of their own aſſemblies.

It was next argued, that principles of equity require this duty to be impoſed; becauſe it is recited in the patent of the 20th of *July* that the Leeward Carribbee iſlands pay it.

To this there is firſt one general and concluſive anſwer—whatever *equity*, *wiſdom*, or *expedience* there may be in the meaſure, it muſt be executed by *legal* means. The propriety of the object can never, in a *legal* view, ſanctify the means taken;* but a particular anſwer is likewiſe ready.

The firſt place in which this tax was ever thought of was the iſland of *Barbadoes*; but there not impoſed under claim of prerogative, but by a *national* act of their own *internal* legiſlature: And it was a grant for ſpecial purpoſes expreſſed, of building their priſon, their courts of juſtice, their fortreſſes, and keeping them for the future in repair. And farther, in conſideration of the confirmation of their titles which had been loſt, or were become obſcure in conſequence of the confuſion of the iſland during the troubles of the preceding reign of *Charles* the firſt.

I muſt be particular in ſtating this. The firſt grant of *Barbadoes* was to the Earl of *Carliſle* from *Charles* the firſt: He divided the lands by ſubinfendation amongſt various purchaſors.

During the troubles Lord *Carliſle* abandoned the iſland; the protector, *Cromwell*, took poſſeſſion, and made ſeveral grants of different parts of it; on the reſtoration the King made a new grant to Lord *Willoughby*, of *Parham*. In conſequence of theſe ſeveral changes of property, and the violent and ſudden revolution of affairs in the iſland, much confuſion aroſe. The creditors of Lord *Carliſle* aſſerted their claim; the grantees of *Cromwell* held by very uncertain claims; and Lord *Carliſle*'s creditors ſucceeding would neceſſarily have defeated the grantees of Lord *Willoughby*. To ſettle theſe diſputes the crown agreed to purchaſe the *whole*; and for the purpoſe of raiſing a fund to diſcharge Lord *Carliſle*'s debts, and the other purpoſes already mentioned, this duty was granted by the aſſembly of *Barbadoes*.

Your Lordſhip will find theſe particulars in the act ſet forth on the record, but more fully in Lord *Clarendon*'s anſwer to the ſeventh article of his impeachment, which is in the continuation of his hiſtory, lately publiſhed.

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* Nil cuiquam expedit quod non per leges licet
Nil utile aut honeſtum quod legibus contrarium.

I dare ſay Mr. *Wallace* will find the principles of equity not ver cogent on *Grenada*, in a compariſon with *Barbadoes* in this particular.

As to *Nevis*, *Montſerrat*, and *Antigua*, with the *Engliſh* part o *St. Chriſtopher's*, the ſame obſervations, in great meaſure, will occur The grants of four and an half *per cent.* in theſe iſlands were likewiſe on ſpecial purpoſes, and were granted by their own aſſemblie

As to the part of *St. Chriſtopher's* conquered from the *French* and ceded by the treaty of *Utrecht*, the very ſame claim was mad in the reign of Queen *Anne*, aſſerted by an act of privy council and exemplified under the great ſeal, the ſame which is now mad upon GRENADA, of impoſing this duty by prerogative. The ac was withdrawn; the duty never collected; the people warmly oppoſed; adminiſtration yielded, and conſented to take it by act of aſſembly; a circumſtance incredible, if they had not been convince that the meaſure was unwarranted by law, and the oppoſition juſt And when the duty was finally granted to the crown it was not onl by aſſembly, but under terms.

So much, therefore, for an argument built on the principles o equity, comparing the impoſition of this duty by act of prerogative in *Grenada* with the ſame duty in the other Leeward iſlands, by ac of their *own aſſemblies*.

[Mr. *Wallace* obſerved the duty was impoſed in 1703.

Lord *Mansfield* ſaid it could not vary this queſtion an *iota*: Tha the cauſe was put on it's proper footing; that he took it as admitted the duty was laid on in 1703, and added, it was raiſed long before the act, which was in 1727.

Mr. *Wallace* ſaid the whole duty in that time amounted to bu 30 *l.* Mr. *Alleyne* obſerved on this that 30 *l.* raiſed in 24 year was a ſtrong argument that hardly any planter, at leaſt any conſiderable planter, had ſubmitted to pay.]

That not only as to the ſubſtantial difference in the authority levying, but in the ability to pay, Grenada was diſtinguiſhed greatly to it's diſadvantage, being a new ſettlement.

Mr. *Alleyne* continued—But farther, as to equality, beſides the reaſons given, common obſervation will ſhew in what manner theſ new ſettlements in the iſland have been made. Large intereſt on loan payable yearly out of their eſtates. So far from additional burthen it might have been hoped from government that they would hav aſſiſted this infant colony, always much below the other ſettlement

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when in the hands of it's former poſſeſſors; and now, if this impoſt ſhould prevail, miſerably below indeed.

But, not to want an argument, which cannot readily happen to the ingenuity of the learned counſel who ſupports the defendant's cauſe, if it be true that the proclamation in words appears fully either a conveyance or recognition of all the rights of *Britiſh* ſubjects to the inhabitants who were in GRENADA, or ſhould reſort thither; and that the iſland is not under circumſtances which ſhould make a conſtruction to ſupport the impoſt favourable in equity, independent of higher conſiderations ſtill againſt ſuch a conſtruction; yet Mr. *Wallace* argues that it muſt mean this, that there ſhould be ſuch an impoſt; becauſe if there is not, the enjoyment of the laws of *England* is ſecured to the inhabitants, which will be an *unwiſe* and *cruel* conſtruction. I believe Mr. *Wallace* is the firſt politician who ever thought that waiving the claim of conqueſt, and inſuring to the conquered the bleſſings of a free government, was cruel. And how would it have aſtoniſhed the wiſdom of imperial *Rome* to hear that it was unwiſe!

That communicating the benefits of a free conſtitution was never thought cruel in a conqueror, and ſeldom unwiſe.

Nor do our own writers omit to admire the policy of King *Edward* the third, in planting a colony in *Calais*, and of courſe communicating to that place the wiſe and beneficial laws of *England*, ſo firm a ſupport of public order; ſo productive of ſecurity and happineſs to every individual living under them.

I have the authority of the great and excellent Sir *Matthew Hale*, affirming this to have been his practice in his other conqueſts, as I have already obſerved, both in *Scotland* and *Wales*, and applauding it highly. At leaſt this objection may be reſerved till the inhabitants of *Grenada* think this benefit a burthen, and complain of it as ſuch. Mr. *Campbell*, certainly, for his part, does not complain, for he comes to claim the benefit of thoſe laws, as his deareſt birth-right: And it will be ſingular if it ſhall happen that any eloquence ſhall perſuade any individual of *Grenada* that it is a reproach to the conquered to partake equally in thoſe laws and conſtitution which are the glory and happineſs of the conquerors, and the admiration of mankind; the *Engliſh* laws: And if they ſhould rather chooſe to ſink again into the ſtate of a people under the hand of conqueſt than enjoy that equal liberty which aboliſhes all invidious diſtinctions between the conquerors and conquered.

That the inhabitants appeared not to have any ſuch objection, nor could it be ſuppoſed, and certainly not the plaintiff.

The particular cruelty, however, which Mr. *Wallace* ſuggeſts is this; eſtates have been ſettled, contracts made, and things done with a view to the regulations of the law then prevailing; to alter this by the proclamation would harraſs and diſappoint the parties, and annull their deeds.

Nothing can be more fallacious than this; for if at any time poſterior to the proclamation any deed, contract, ſettlement, or any other matter of law had been brought into litigation, and appeared to have been tranſacted in conformity to the *French* laws, previous to the proclamation, and while the laws of *France* were yet in the iſland, thoſe laws would have been adopted, and the inſtrument would have had it's intended effect according to them; and the law of *England* would have taken notice of them, as it does of all foreign laws, where contracts are made under the authority of thoſe laws; exactly as in caſes which have happened in chancery and in this court.—All mercantile contracts have this effect: And ſo it is allowed, as a ſettled rule of law, in the caſe of *Freemoult* and *Dedire*.* The line, therefore, is ſufficiently broad, and, at the ſame time, ſufficiently clear: And defined *from* the proclamation; the *Engliſh* ſhall prevail as to all ſubſequent tranſactions; till the proclamation the *French* laws. 2 P. W. 429. Ter. Pasch. 1728.

But in ſupport of his general propoſition, concerning the nature of the rights of a conquered people, Mr. *Wallace* has cited two illuſtrious names, names which I ſhall ever mention with the greateſt reverence. Yet I have ever wiſhed to argue from the ſentiments of writers who have ſurmounted prejudices, and reaſoned liberally, not devoting myſelf to the greateſt name with an unlimited attachment. Great and extenſive as their genius, their learning, their application was, it is well known to thoſe who are converſant in their writings, that they have adopted in moſt places the poſitive conſtitutions of the imperial law, as abſtract general truths of nature; hence in moſt places their reaſoning is ſomewhat too confined for the univerſality of the ſubject, and in many liable to exceptions. Far be it from me, however, to ſpeak irreverently of them; they have broken the ground, though they diſcovered not all the treaſures of the ſoil; and though they might in ſome inſtances be miſtaken in the true quality of the ſoil itſelf. And to their great labours the refinement of pubblic law is originally owing.

With reſpect to the inſtances of prerogative intended to have been adduced to juſtify this I find only one mentioned, which, ſurely, cannot be ſuppoſed to ſupport it by the compariſon; the ſeizure of the *Maſſachuſet*'s charter in 1683, in the reign of *James* the ſecond. No man will wonder at the violence: The impriſonment of the biſhops; the campaign of *Jefferies*; the ſeizures of every charter left by his brother were then as acts of ordinary juſtice at home. And when the city itſelf was not ſafe, we ſhall not wonder the *Maſſachuſet*'s bay was invaded.

Mr. *Wallace* has not choſen to argue the right of ultimate judicature in this court and in the *Houſe* of *Lords*. He leaves me, therefore,

fore, at large, with the obſervations I made on that point; and with a conceſſion thus far at leaſt, that there is no argument from experience to the contrary.

The laſt ſtreſs, on the cloſe of the argument, was placed on the expedience and neceſſity of the power of legiſlation continuing in the crown till the legiſlature of the iſland actually ſat.

This argument would go far indeed; it would ultimately prove that in the *receſs* of *parliament* the *crown* is *arbitrary legiſlator* of this empire, and may impoſe a *permanent* tax on *Great Britain* itſelf.

But the conſtitution has happily provided a power in the crown, by which it is enabled to obviate *ſudden* emergencies; or in caſes not provided, *bills* of *indemnity* have always confirmed, by an *act* of *ſtate*, what was required as an exertion of extraordinary power.* *Ne quid detrimenti caperet reſpublica*; affirming and ſtrengthening the general rule by the very means uſed to protect the neceſſary deviation, and which nothing leſs but ſuch a ſolemn judgment of the collective body of the ſtate allowing it's neceſſity, can protect.

So in *Grenada*, from the firſt proclamation in *October*, 1763, to the ſeſſion of the aſſembly in 1765, the crown had ſimilar powers for obviating ſudden emergencies, amongſt the number of which powers a *permanent* tax cannot be eſteemed.

I have now had the honour of ſubmitting to your Lordſhips what conſiderations occurred to me in reply to Mr. *Wallace*'s argument, of which it would ill become me to ſpeak with diſreſpect; I ſhall only ſay that it appears fairly anſwerable in the manner I have ſubmited.

And now, I truſt, I may take leave of this ſubject by congratulating my client (for if better arguments were to have been found Mr. *Wallace* had diſcovered them) with being ſecure, and ſtanding on a ground which will warrant my application to the court for judgment for the plaintiff.

CURIA ULTERIUS ADVISARE VULT.

[*Note*, After the argument Lord *Mansfield* ſaid, the cauſe has been very well argued. There is one thing, however, which neither of you have defined preciſely. Have you any idea a colony can be ſettled by *Britiſh* ſubjects without the intervention of the crown?

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* Salus populi ſuprema lex eſto.

Mr. *Alleyne*—If ſubjects ſettle on an iſland *uninhabited*, for inſtance a ſhipwrecked crew, they cultivate, they inhabit. If th crown claims this iſland as a ſettlement by its own ſubjects, the have a right to ſay give us a conſtitution, govern us by the laws o *England* or not at all. If it demands a tax they have a right to ſay no: Till it be demanded legally in a conſtitutional mode.

Lord *Mansfield*—All colonies have been eſtabliſhed by grant from the crown—I do not mean it as material to this queſtion, bu that it ſhould be underſtood no colony can be ſettled without authothority from the crown. As to the doctrine of thoſe caſes in *Salkeld* I do not think much of it; it is very looſe.

Mr. *Alleyne*—To meet the whole argument in the cauſe I at firſ ſtated, that this colony was ſettled by authority of the crown.

Lord *Mansfield*—I underſtood you ſo; let it ſtand for anothe argument.]

Afterwards in the ſame term on the 5th of *May* 1775, it wa argued by Mr. *Macdonald* for the plaintiff, and Mr. *Hargrave* fo the defendant, nearly to the effect following:

Mr. *Macdonald*.—This is an action brought againſt a cuſtom-houſe officer in the iſland of *Granada* for money had and received The object is to recover a ſum of money levied by the defendant a a duty, and paid by the plaintiff; but paid, he contends, withou *legal* conſideration.

There is a ſpecial verdict, which, after what has been argued ſo fully and with ſo much perſpicuity, it will be only neceſſary fo me in point of form to ſtate very ſhortly.

The jury find the iſland of *Grenada* in the *Weſt Indies*, was i the poſſeſſion of the *French* King, and conquered by the *Britiſ* arms; that there were ſeveral cuſtoms paid and payable to th *French* Monarch, upon goods exported and imported into the iſland They find the ſurrender of the iſland to the King of *Great Britain* in *February* 1762; in the articles of which the inhabitants are recognized as *Britiſh* ſubjects, and the ſame protection and privilege granted as to the *other colonies* of *America*. And that they ſhoul not be obliged to bear arms againſt his Moſt Chriſtian Majeſty while the then war continued, and the fate of the iſland remaine undetermined; that they ſhould take the oath of allegiance; tha they ſhould be governed by their own laws, *until his Majeſty' pleaſure ſhould be further known*.

They find the treaty of the 10th of *February* 1763, by which the *French* King renounces *Nova Scotia*, *Canada*, and other countries to the King of *Great Britain*; and in *October* 1763, The King of *Great Britain*, by his proclamation, aſſuring the inhabitants of his new conqueſts, and amongſt them *Grenada*, of his paternal care; and that he has given order to his governors that, ſo ſoon as may be, they ſhall call aſſemblies, with power to the governor, with conſent of the council and repreſentatives ſo aſſembled, to make laws as near as may be conformable to the laws of *Great Britain*: In the mean time all perſons may confide in his Majeſty's royal protection, and the benefit and enjoyment of the laws of *England*. Then the proclamation proceeds, and conſtitutes a council to determine all civil and criminal cauſes according to the laws of *Great Britain*; the jury find a ſecond proclamation in *March* 1764, reciting the benefit of a ſpeedy ſettlement of the iſland of *Grenada* and the other iſlands; directing a ſurvey of lands, and a certain number of men and women to be maintained on the lands under penalties; they further find that his Majeſty, by his letters patent in *April* 1764, made *Robert Melville*, Eſq; his Governor in the iſland, in the room of Governor *Pinfold*, to act under inſtructions given and to be after given, ordering him as ſoon as ſituation and circumſtances will admit to call aſſemblies, with full power to make and ordain laws, ſtatutes and ordinances, for the welfare and good government of the people of the iſland of *Grenada*.

Afterwards by letters patent the 20th of *July*, 1764, they find a tax impoſed by claim of prerogative in the ſame manner as in the iſland of *Barbadoes* the 20th of *July* 1764, of four and an half *per cent.* on commodities exported; they find the defendant levied the tax, and plaintiff paid.

The verdict farther finds the action brought by conſent of the Attorney-General.

I am humbly to contend before your Lordſhip, *firſt*, *that no ſuch tax could be impoſed* by *prerogative*.

And *ſecondly*, that admitting the crown by prerogative was intitled to have impoſed ſuch a tax, his Majeſty by his *proclamation* of *October* 1763, *prior* to the inſtrument for raiſing ſuch tax, has *waived* that right.

Your Lordſhip finds by the ſpecial verdict that the iſland of *Grenada* was conquered by the *Britiſh* arms in *February* 1763, and by treaty ſurrendered.

I take it to be clear that the ſovereign of the ſtate conquers not for himſelf *perſonally*, but for the *ſtate*: And according to this I have a great authority, which I ſhall beg leave to cite to your Lordſhip.

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B. 3. § 202. *Vattell*—He ſays, it is aſked to *whom* the conqueſt belongs, th *Prince* or *ſtate?* This queſtion ought never to have been aſked. Whoſ are the arms; whoſe the expence? If he conquered at his own, ye whoſe blood is ſhed? If he uſed mercenary troops, does not he ex poſe his ſtate to the reſentment of the enemy?

I collect from the ſame author, who lays it down as a princip of the law of nations, if an uninhabited country be planted b *Britiſh* ſubjects, all the *Engliſh* laws which are the birth-right o every ſubject are there immediately; but if it be a conquered ſta which has laws of its own, thoſe laws remain there until others ar provided.

Lord *Mansfield*—Does he quote any authorities?

Mr. *Macdonald* continued—After a country is become part of th ſtate he ſeems to take it, as a *principle* that it partakes of its conſti tution; and therefore not to think authorities neceſſary.

Lord *Cokes*'s reports—*Calvin*'s caſe—That the King may alter o change the laws of a conquered country, but till he doth the forme laws remain. This can only mean *flagrante bello* that he may do it or in countries when the whole legiſlation is in the King.

Salk. 411. the difference of the facts in that caſe, prevents m quoting to your Lordſhip the deciſion itſelf; but upon the genera principle what the court laid down was thus: In the caſe of an un inhabited country, all laws in force in *England* are in force there but *Jamaica* having been a conquered country, and not found par cel of the *Britiſh* dominions, the laws of *Jamaica* ſtand in powe till others are appointed.

[Lord *Mansfield* ſaid upon this, the opinions are very looſe an with a total ignorance of *facts*: *Jamaica* was conquered by *Olive Cromwell*; I believe none of the conquered ſubjects remained.

It is abſurd, that in the colonies they ſhould carry all the laws o *England* with them; they carry only ſuch as are *applicable* to the ſituation: I remember it has been determined in the *council:* Ther was a queſtion whether the ſtatute of charitable uſes operated on th iſland of *Nevis:* It was determined it did *not*; and no laws but ſuc as were applicable to their condition, unleſs expreſsly enacted.]

I would farther remark, that where the words "king or ſove "reign" in treatiſes of general law are introduced, I would under ſtand them according to the *nature* of the ſtate of which they ar ſpoken, or to which to be applied. Thoſe words of *Grotius Rex*

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regnum tranſlate them into *Dutch*, I ſhould call the ſtates general the king or ſovereign; and if into *Engliſh* "*king and parliament*." I don't contend the *formal part* of the law of *England*, but the *legiſlative* part goes thither. If I am right in my idea of the law of nations, it confines the power of the conqueror, merely within the time of conflict, and whilſt the ſword is the only law to which either ſide can reſort; but when a country *ſurrenders* to the *Britiſh* arms, when military government ceaſes, what can come in but the law which governs every particular ſubject; the legiſlation of *Great Britain?* When the ſword is once ſheathed, I can not conceive of the exiſtence of any other power but the *legiſlative* power, the conſtitutional law, or government. The *forms* of their conſtitution may and muſt remain till the executive power diffuſes thoſe which obtain in his other dominions. I take it laying on impoſts without conſent of parliament was one of the great points on which the revolution turned; and another revolution much earlier; and *Magna Charta*, and almoſt innumerable ſtatutes. When we talk upon this ſubject the preſent ſtate of things is always out of the queſtion, I ſhall therefore diſcuſs the topic freely.

Lord *Coke* in his treatiſe on the ſtatute of talliage ſays, no SUBJECT ſhall have money levied on him without conſent of parliament; and after goes *farther* and ſays, NO MAN, that is I conceive who can call himſelf a *Britiſh* ſubject, though in another country, ſhall be taxed without his repreſentatives.

Here upon the principle of the law of conqueſt, by what reaſon can the power extend over the conquering people themſelves; ſhall thoſe who conquered with him ſhare the fate of the conquered? It would be repugnant to every principle of reaſon, and to every writer upon the law of nations.

Vattell, page 92, a principle of the law of nations, that whereever a nation ſettles and eſtabliſhes a colony, that colony becomes a part of the dominion, and all that is ſaid of the parent ſtate applies to the colony.

Grotius ſays, that ſubjects ſettled in a country *carry the ſame privileges they left behind them.*

What is the difference between ſettling in a country uninhabited or inhabited? As to the executive power they muſt wait the directions of that power; as to the *legiſlative* the law is the ſame to them as that which governs me, and every man who hears me.

1621, *March* 17th, 25th, a bill brought into council.—It was that which reſtrained the fiſhery.

The journal of the houſe ſays—The ſecretary ſaid this is a conquered country, 'tis the King's; you have nothing to do with it: Th parliament held they were part of the dominions of the ſtate; they ſay the penalties and forfeitures are *void*, as not being by authority of parliament.

Sir *E. Coke* ſaid how not ſubject to parliament, why they paſs b the King's letters patent?

To be ſure it is true the King cannot grant penalties and forfeitures, for that would be impoſing a tax under colour; and it i proved demonſtrably the prerogative of the crown had not tha power over them.

[Lord *Manſfield*—I take it thoſe penalties were recoverable here.]

The conſequence in the very next charter was a grant of a fre fiſhery.

In the charter granted to Mr. *Penn* there is this remarkabl clauſe, that no impoſition ſhall be levied on the colony withou conſent of the proprietor and aſſembly, but by act of parliament i *England*. *Calais* was a colony.

[Lord *Manſfield*—Was *Calais* a colony? It was ceded by the treaty of *Bretigny*.]

Lord *Vaughan* 290 ſtates writs of *non moleſtando*, iſſuing out o chancery to the mayor of *Calais*, and divers writs of error.

With regard to the other parts not colonized, all mandatory writ iſſued hence as they might do to any part of the King's dominions Lord *Vaughan*, but without precedent, ſays, writs of error migh iſſue to *Ireland*; I don't find however that *remedial* writs ever iſſued but *mandatory* writs.

The conqueſt of *Wales*, by *Edward* the firſt, has already bee very fully conſidered, and I find no reaſon to depart from the groun then taken. The language of that King was that every part of hi dominions not in his poſſeſſion was *feudatory* to him, *quia in proprietatis dominium totaliter converſa et tanquam pars corpori annexa e unita*.

From the conqueſt no inſtance of any but the *legal* authority exerciſed.

The conqueſt of *Ireland* is the next. *Co.* 4th *Inſt.* ſays that *H.* 2 ordered the laws kept in *England* to be obſerved in *Ireland*, an tha that he ſent a tranſcript. *Leland* conſidered this as merely *declaratory* of the neceſſary conſequences of the laws already received.

In *Harris*'s *Hibernia*, from the records, a grant to *Felix Stephens*, with the wardſhips: This could not have been conſtituted without manner of recovering according to the laws of *England*.

Lord *Holt* ſays, which concurs with this argument, it was not the mere *conqueſt*, but the ſubſequent *ſettling*, which let them into the ſame rights with the other ſubjects.

In Mr. *Petit*, 80, to ſhew the commons of *England* ſat ſeparate before the 37 *H.* 3. a regiſter is cited.

In the 28th of *Henry* the third, by the queen regent to the archbiſhops, biſhops, &c. of *Ireland*, to aſſemble. Therefore *Ireland*, *Wales*, *Scotland*, all partook of the conſtitution; all were and are exempt from taxation by prerogative. I have ſpoken already of *Pennſylvania*; the ſame argument will apply to the other colonies; the ſame to *Grenada*.

But ſecondly, even if the colonies are not exempt from ſuch taxation by prerogative, except the King waive and renounce it, has not the King barred his right?

The capitulation requires liberty of ſelling lands. They are allowed to ſell them to *Britiſh* ſubjects.

They deſire the laws of *Antigua* and *St. Chriſtopher's*, which, except a few local ordinances, are the ſame as in *England*, and they are promiſed in anſwer that they ſhall be conſidered as *Britiſh* ſubjects.

7 *October*, 1763. That all perſons may rely on the royal favour of *Great Britain* till the aſſembly can be got together, courts of juſtice are to be erected, with authority over cauſes criminal and civil, as near as may be to the laws of *England*.

Then in *March* it takes for granted they have relied on the encouragement and aſſurances of the former proclamation, and a ſurvey and diſtribution of lands is ordered.

Then by the patent creating Mr. *Melville* governor of *Grenada* and the other iſlands he is ordered to call an aſſembly as ſoon as poſſible, for the purpoſe of making laws. I can ſee nothing ſtronger than the language of the proclamation.

That proclamation was ſaid to be *executory*. "The calling a "aſſembly is merely *diſcretionary* in the governor." Shall the effe of the proclamation be ſuſpended on that event? Muſt we conſtru "I give the law of *England until* you have an aſſembly" to thi "You ſhall *not* have the laws of *England till* you have an aſſembly."

The legiſlature of the colonies might make ſuch addition of loc ordinances as they ſhould think fit.

One of the benefits is this proclamation.

On what authority was the proclamation? The King had no righ to levy the tax 20 *July* 1764, unleſs under the patent in *April*. W need only compare the dates.

But it is ſaid there is no law at all. If the King has not, wh has? I anſwer, the ſupreme legiſlative power of the ſtate. Th ſtamp-act prevailed at that time.

It is a principle in contracts between political bodies contractin ſtill more neceſſary than between private perſons, that the gra once made, can never be recalled, and cannot be releaſed till th conditions of the contract are broken by the one or the other.

This compact is what every ſpeculative writer requires in his cloſet; what practice requires in all ages between nations; and whic mutually and irreverſibly bound both parties.

As to the iſland of *St. Chriſtopher's*, the opinion of Lord *Hardwicke* and Sir *E. Northey* is obſervable.

Argument ab reſponſis prudentum.

They certify they have prepared a draught of ſeveral laws of fo and an half *per cent.* on the conquered part of *St. Chriſtopher's*, a far as they thought the *condition would permit*, conformably to th proclamation 1703, which was in the time of the war.

That Sir Philip Yorke and Sir Clement Worge ſaid that if Jamaica be conſidered as a conquered country the King can impoſe a tax by prerogative, otherwiſe not.

Sir *Philip Yorke*, 22, and Sir *Clement Worge*, attorney and ſolic tor-generals, were aſked how far the King could, by his prerogative, levy a tax on the iſland of *Jamaica*. If *Jamaica* is ſtill to b conſidered as a conquered country, the King has that right; but it be in the ſituation of the other iſlands the tax cannot be levie unleſs by act of aſſembly, or of *Engliſh* parliament.

[Lord *Mansfield*—I believe your report is wrong.]

It was ſaid the tax was expedient; if it is meant it is expedient to them to have their money taken from them (but I can't conceive how that ſhould be) the tax is very expedient: But I have no doubt the court will conſider whether it is *lawful*, and upon that ground reſt, with good expectation, the cauſe of the plaintiff.

[Lord *Manſfield*—They allow the validity of the letters patent of 1764, ſo far as they annul the poll duty; this comes in lieu of it.

Note, It ſeems they were never paid after the conqueſt, and there was an interval of two years.]

Mr. *Hargrave*, on the other ſide—When I conſider the great importance of the queſtion which ariſes on the caſe, and how ably and learnedly it has been argued, I feel a great difficulty, and wiſh the burthen of anſwering ſo learned an argument had been left to an abler perſon, in a queſtion of ſo great importance. However, I am the leſs anxious ſince it is certain that the law muſt decide, and not the abilities of the ſpeaker.

There are two queſtions; firſt, Whether the King has a right to levy impoſitions on the iſland of *Grenada* by prerogative?

The two queſtions in the cauſe.

2dly, Whether if there be ſuch a right, it was not, in this caſe, *barred* by the proclamation?

It is not neceſſary to argue what are the rights over a conquered country. To deſtroy, to kill, to commit depredation, are what I ſhall not argue. But the making of *laws* I apprehend to be one certainly. Expreſs ſtipulations are undoubtedly to be rigidly obſerved: But where there are *none* the conquered country becomes ſubject to the legiſlative power of the conqueror; not liable to any reſtrictions but thoſe of natural juſtice and equity.

That the right of making laws is one eſſential right of conqueſt.

This will not go far towards deciding the general queſtion, in whom that legiſlative power reſides.

I apprehend the authorities concur in attributing that power to the King, as a part of his prerogative.

That this power is in the King.

Your Lordſhip obſerved the authorities were ſo confuſed as not much to be depended on. True, as to the hiſtory of facts; but as to the principles of law they are *clear*.

The earlieſt is *Calvin*'s caſe, 7th *Coke*, 17. A diſtinction between countries veſting by conqueſt and deſcent. The doctrine imputed to the judges by my Lord *Coke* is not entirely extra-judicial.

Diſtinction in Calv. between chriſtian and infidel country reprobated; but that the principal points are not.

He takes a difference between the conqueſt of a chriſtian kingdom and of the kingdom of an infidel: This has been long enough juſtly *exploded*, but will not prejudice the reſt.

[Lord *Manſfield*—Don't quote the diſtinction, for the honour of my Lord *Coke*.]

He goes on—he might at his pleaſure alter and change the laws of that kingdom; but till he doth make an alteration, the laws of that kingdom remain.

Admitted that when he has given the laws of England the legiſlative power of the King ſolely ceaſes.

When he has given the laws of *England* his legiſlative power ceaſes, and they are only ſubject to the legiſlation of the parliament.

The doctrine ſo given is the opinion of all the judges, and is not entirely extra-judicial, as given in anſwer to what was ſaid by counſel taking a diſtinction.

Sir John Wytham *v.* Sir Richard Ditton. 3 Mod. 159.

Before and ſince the revolution the ſame prerogative has been acknowledged in the crown. The firſt caſe 3d *Mod.* 159. *Shower's* P. Caſes, 24, againſt the governor and council of *Barbadoes*, for falſe impriſonment. Counſel for the plaintiff argued that, according to *Calvin's* caſe, the King might impoſe laws on a conquered country, but denied that *Barbadoes* was a conquered country: The judgment for the plaintiff was reverſed in the Houſe of Lords.

Blanchard *v.* Galdy.

The next caſe, *Blanchard* and *Galdy*, after the revolution, *Cumberbach*, 128, the court held that the ſtatute did not extend to *Jamaica*; becauſe, being a *conquered* country, the laws of *England* did not extend to it till introduced by the conqueror or his ſucceſſors.

2 *Peere Williams*, 75, ſaid by the maſter of the rolls to have been determined in council, that in an uninhabited country they carry the laws of *England* with them. And in the caſe where the King of *England* conquers a country, the conqueror, by ſaving the lives of the people conquered, gains a right and property in ſuch a people; in conſequence of which he may impoſe on them what laws he pleaſes. The principle may be wrong, but not the general inference.

Doctrine in 2 P. W. that a conqueror by ſaving their lives gains a property in the people conquered reprobated.

[Lord *Manſfield*—It is very ill expreſſed in the report. The maſter of the rolls *never expreſſed himſelf ſo*.]

Then, as to other countries; firſt, as to *Ireland*, there are very different opinions. *Coke* holds the laws were introduced by *John*, and that *Henry* the ſecond gave laws to them as a *conquered* country;

but that now no King can alter them without authority of parliament.

4 *Inſt.* 304, allows *Henry* brought them in.

The opinions of Lord Coke, Sir John Davies, and Molyneux, concerning the conqueſt of Ireland.

Molyneux argues againſt the authority of the *Engliſh* parliament, "They were not introduced by conqueſt, but by their own deſires and "conſent." *Davies* ſeems to argue, more conformably to hiſtorical facts, that the laws were not introduced *ſimul & ſemel*, but gradually, and were not univerſally prevalent till the third year of *James* the firſt. It is remarkable, however, though the writers are different in opinion, not one denies the introduction of the *Engliſh* laws to belong to the King by prerogative over a *conquered* country, except *Molyneux*.

Wales.

The next inſtance is the conqueſt of *Wales* by *Edward* the firſt. There is a doubt whether the firſt act was an act of parliament or a charter. *Coke* calls it a ſtatute, ſo does *Plowden*, 126, ſo does *Hale*; but *Vaughan* doubts it, and *Barrington* denies it. *Vaughan* allows (and he was not a prerogative lawyer) that *Edward* the firſt might inſtitute laws *without parliament*. P. 400.

[Lord *Mansfield*—*Edward* the firſt conſidered *Wales* as an ancient fief of the crown. My Lord *Vaughan* does not make that diſtinction]

Colonies. That they flow from royal prerogative.

I now come to *America* and the colonies there. All of them derive the whole form of their government from an exertion of the royal prerogative. Their courts of juſtice, their aſſemblies, their power of taxation, flow from the ſame ſource, however impure it may be thought.

Impoſt in 1606 by prerogative.

10 *April*, 1606. The King veſts the power of government in perſons who ſhall be appointed by conſent, and alſo impoſes two and an half *per cent.* impoſt. This was before the revolution; but even ſince there have been authorities: The caſe of *Blanchard* and that in *Peere Williams* have been always cited.

Tax impoſed by Ja. 2. ſupported by an opinion, after the revolution, of Lord Somers.

In 1686, the government of *New England* having been ſeized into the hands of the crown, King *James* the ſecond appoints governors to regulate taxes: They were to continue the old till other ſhould be ſettled. I ſhould be aſhamed to quote an inſtance of prerogative in *James*'s reign if not ſupported by lawyers who lived ſoon after the revolution.

In 1689 the Lord *Somers* gave an opinion, when attorney-general, in the caſe of *Uſher*, who denied the legality of the tax, and ſaid the revenue officers were liable to an action. This caſe, unle the difference be of taxes to continue or new created, is very ſtrong

Lord Mansfield—That it did not appear this was an official opinion.

[Lord *Mansfield*—But it did not clearly appear whether their op nion came officially or upon a private caſe.]

Opinion ſtated.

“ I conceive Mr. *Uſher* would not be liable to an action, at a tim “ when the corporation was in the King's hands, and the former go “ vernment ceaſed.”

Lord Mansfield—That the opinion went on the diſſolution of the charter.

Lord *Mansfield*—They conſidered the charter, being vacated, th ſame as if it had never exiſted, and they went on without charte till 1694 or 1695.]

The other opinion was, that if the judgment was good, which remained unreverſed, the tax would be good: This was Sir *G. Treby*, I think. Some don't go ſo largely, but they make no difference between a conquered country.

[Lord *Mansfield*—You miſtake: The charter being vacated, they held they were to be taxed, as the province, by commiſſion.]

Sir E. Northey's opinion for the impoſt.

Sir *E. Northey*, as to the conquered part of *St. Chriſtopher's*, held the Queen by commiſſion might impoſe taxes; for that by prerogative ſhe might impoſe laws of every kind on a conquered country.

Sir Philip Yorke and Sir Clem. Worge.

A more recent caſe. In the reign of the late King Sir *Clement Worge* and the then ſolicitor-general were conſulted, whether taxes might be impoſed by prerogative; their anſwer was, if *Jamaica* was to be conſidered as a conquered country they might.

Objection, that argument from ideal analogy will not do, nor from what prerogative ſhould be, but what is the fact and the law.

We are not to compare the caſe with analogy to the *Engliſh* conſtitution. It might be more conformable to the general conſtitution, it might be more convenient, it certainly would be more uniform, were the colonies on the foot of *Ireland*; but we are not to enquire what ought to be law, but what actually *is*. We are not to enquire whether the prerogative is broader than it ought by that analogy, but how it really ſtands. If it requires reſtraining, that is the buſineſs of parliament.

As to the conquered part of *St. Chriſtopher's*, the opinion was, the law extending to ſuch part of *St. Chriſtopher's* as belonged to *Great Britain* when the law was made, they cannot be ſubject to the law; but the Queen might, if ſhe pleaſed, iſſue letters patent, which would be law there, and would bind conquered countries.

This was the opinion of the now chief juſtice of the Common Pleas when attorney-general.

By the articles of capitulation they were to become *Britiſh* ſubjects, but be governed by their own conſtitutions till the King's *pleaſure* be farther known.

The great queſtion aroſe on the proclamation and letters patent, whether both were executed or executory, and to what the calling of aſſemblies extended.

The proclamation was not a gift, but a promiſe to give. I inſiſt upon it the legiſlative power was not transferred from the crown till there was an aſſembly capable of receiving it. The principal point argued laſt time was what I am now conſidering, and was then ſo ably argued by Mr. *Wallace*, that I think it not neceſſary to add any thing. The queſtion was, whether not only the *Engliſh* laws paſſed in the form of adminiſtering juſtice, but the *Engliſh* conſtitution.

That the proclamation is not a gift, but a promiſe to give.

Lord *Mansfield*—There are three inſtruments.

Proclamation.

Survey.

Commiſſion to the governor.]

Mr. *Hargrave*—I don't quote the ſecond, becauſe only regulating the lands.

[Lord *Mansfield*—It recites the proclamation, and engages perſons to come and ſettle.]

I wiſh there had been authorities clearer on the ſubject. They are, perhaps, very much weakened by hiſtorical inaccuracies; but ſtill, I ſubmit, they are uniform in their principle, and fully juſtify the defendant.

Mr. *Macdonald*, in reply—The queſtion of prerogative in the time of *James* the firſt was ſhort. *James* meaſured the underſtandings of his ſubjects by the rule of three, and found they were to thoſe of the King as the braſs ſtuds in a ſaddle to the ſtars in the firmament. Perhaps he meaſured their right to liberty and his of command by the ſame proportion.

But, as to what has been done under claim of prerogative, I conceive it to be ſtronger that it was done and revoked than if it had never exiſted.

All the other precedents talk of a conquered country without diſtinguiſhing.

[Lord *Mansfield*—*Nevis* is mentioned as one of the inſtances tha the conquered country is in the power of the King; not *excluſive* o the conſtitution, becauſe the King has no power *excluſive* of parliament.]

My Lord, they would be ſubject to all the inconveniences of a double government.

[Lord *Mansfield*—Why, are they not? They are ſubject to their own acts—and are they not at the ſame time ſubject to parliament?]

Mr. *Macdonald*—My Lord, I hold that is a queſtion detached from this.

And which ever way it be held, the plaintiff is not contending it before the court; I hope ſo far as he is he has the opinion of the court on his ſide.

Mr. Juſtice *Willes*—I think as ſoon as ever the King has paſſed an act he gives up his authority, whatever it was before.

On one ſide they prayed a farther argument, on the other the judgment of the court. As being a revenue queſtion it ſtood over. It was argued about two hours and an half. Lord *Mansfield*, immediately after the argument, expreſſed his readineſs and inclination to give judgment

On *Monday* the ſixth of *June* it was moved for farther argument. Stood over till the *Tueſday* ſe'ennight.

Tueſday 14th of *June*.

It was entreated it might ſtand over till *Friday*.

Lord *Mansfield*—I don't ſee any inconvenience in going over till next term. It is your own delay. It is abſolutely impoſſible to give judgment this term. Suppoſe we were all agreed, many matters are thrown out in argument which are not abſolutely neceſſary in the deciſion, but of which it would be neceſſary to the court to take notice.

What the value of the *French* duties may be I don't know: It does not appear in the caſe. Suppoſe the court ſhould be againſt the impoſition of thoſe duties which are impoſed in lieu of the *French*, there would ariſe a queſtion concerning thoſe duties.

Can you have any doubt upon the moſt material argument of all?

The importance of the firſt queſtion made by Mr. Macdonald.

The firſt queſtion made in the ſecond argument by Mr. *Macdonald*, I think, is one of the greateſt conſtitutional queſtions that, perhaps, ever came before this court. As my brother *Aſton* is abſent, I wiſh, principally upon that account, that it may ſtand over. It is impoſſible it ſhould ever be paſſed over in ſilence.

Mr. *Campbell* moved that judgment might be given upon the former argument, but Lord *Mansfield* reminded him that he could get no farther, becauſe it muſt neceſſarily come into the Exchequer; and even if that were not the caſe judgment could not have been given in the term, both on the account of the abſence of Mr. Juſtice *Aſton*, and as the laſt day would be a *Wedneſday*.

7th of *November*, 1774.

The *Grenada* cauſe came on for the third argument by Mr. Attorney-general on the part of the crown, and Mr. Serjeant *Glynn* for the plaintiff.

Mr. Serjeant *Glynn*—This caſe, one of the moſt important in it's principles, and in the conſequences dependent on the deciſion, that was ever argued, comes before the court on a ſpecial verdict, ſtating that the iſland of *Grenada* was in poſſeſſion of the *French* King, and conquered by his *Britannic* Majeſty's arms in 1762. The inhabitants permitted to ſell their lands to the ſubjects of *Great Britain* only by the articles of capitulation in 1763.

Proclamation, reciting the benefits from a regular colonization; promiſing that aſſemblies ſhall be called, with power to make laws: In the mean while the ſubjects to confide they ſhall be governed by the laws of *England*.

Proviſion made of legiſlation to be executed by the governor 9th of *May*, 1764. Patent to the governor to call an aſſembly as ſoon as convenience ſhall admit.

Proclamation 20th of *July*, 1764, for levying an impoſt of four and an half *per cent*.

Stated—Aſſembly called about the end of the year 1765.

State of cuſtom of the other iſlands. The impoſt by aſſembly.

State of *St. Chriſtopher's*, only where there's a difference of collection; part having been ſubject to the King of *France*.

They find the impoſt levied on the plaintiff by the defendant; and that it is upon the impoſt ſo levied this action is brought. And on the whole matter if the money legally collected, then they find for the defendant; if not then they find for the plaintiff.

The queſtion is—whether the King has a power, without acts of aſſembly or parliamentary regulation, to impoſe any tax upon the inhabitants of the iſland of *Grenada?*

The proviſion for peopling the iſland, the commiſſion to governor *Melville* for the well governing of the iſland, are both material.

The argument for the defendant built on an abſolute power in the crown over a conquered country, annexed to the dominion of England.

I cannot help taking notice of the principle, on which the claim of the King is founded, to the raiſing of this impoſition, which is, that the King has a right to exerciſe a *deſpotic* power over a *conquere* country, *annexed to the dominion of Great Britain*; and that thi power is *legally*, *permanently* and *uncontrollably* in him. I think, though not neceſſary to this deciſion, it will throw light upon many points contained in it.

If it could be ſhewn that the law had aſſerted this, and no contrary deciſions had denied it; that the courſe of hiſtory proved it that it had ever been aſſerted; that there were no times in whic the exerciſe of it had been diſputed, or if there were that it ha never been judicially contradicted; and that the King had alway exerciſed it: However unagreeing with our principles it might appear, and however dangerous to the conſtitution that the King ſhoul have independant dominion; yet if it were ſo upon the authoritie as ſtated, I ſhould hold it a very formidable argument; but I hol that the opinions have been *ſilent*, that there have been *no deciſions* that the courſe of our hiſtory has no *veſtiges* of it, that it never ha been *exerciſed*; and that every *hint* of it has been rejected with diſguſ

That of *Calvin* was a queſtion, whether a *poſt-natus* of *Scotlan* was a natural-born ſubject of the King of *England*, after the union it was held he *was*, becauſe the center of unity was in the perſon the King. No neceſſity of entering into the diſcuſſion whether be Lord *Coke*'s opinion, or of the judges.

The general definition is—of a King of a conquered people, an a propoſition is laid down generally.

" If the King make a conqueſt of a chriſtian country, their laws " remain till he gives them others; but if he make a conqueſt of an " infidel country, they are preſumed to have no laws, he may give " them what laws he pleaſes; but guided by natural juſtice and equity." I quote this not for the ſake of any thing but the uſe I ſhall make of it by and by, ſhewing, that a ſubſequent authority went to that only; and this was an idea which was not received by your Lordſhip the laſt term, but rejected with a declaration, that for the honour of Lord *Coke* it ought not to be ſpoken of; as I hope it never will.

That the term King muſt mean the ſovereign power, whether in one or many.

He is ſpeaking of a *King*, not particularly of the King of *this* country; if it were to be underſtood to belong to any King it would be evidently wrong as to *Poland*, or as to the then conſtitution of *Sweden*. If a conqueſt be made by a King of *Poland* by a *Poliſh* army, it is made not to the King perſonally, but to the King and Senate of *Poland*; and ſo of *Sweden* at that time.

A very reſpectable author was cited to your Lordſhip, by Mr. *Macdonald*, who very ably argued from his book, that all acquiſitions by conqueſt are made for the ſtate; and are therefore at the diſpoſal of thoſe who make them, that is to ſay, the ſtate according to its ſeveral conſtitutions, and different diſtributions of legiſlative power.

In agreement with this author, who ſtates the doctrine in a deciſive manner, I think it clear the conqueſt made by the ſtate, for the benefit of the ſtate. *Execution* and adminiſtration of all laws in *England* is in the crown; the power of making laws according to the conſtitution of the ſtate which he governs here is in the crown, with the two other parts of the legiſlature. When Lord *Coke* gives his opinion, he muſt have taken it from writers of general law, and thoſe for the moſt part of *abſolute* monarchies; and he took the word King as a general word, which in their ſenſe of it comprehends the whole conſtitution.

Objected, That Lord *Coke*'s authority muſt be taken otherwiſe becauſe it has been underſtood in other caſes to belong to the ſole powers of the King; and it was taken on this authority, the King had the right of making independant laws over a conquered country; and that a King was in the ſame ſtate even as to a colony, unleſs otherwiſe provided by charter.

It is ſaid in *P. W.* the ſame point was determined. *P. W.* inſtead of ſpeaking of the bare power of the *King*, ſpoke of the power of a *conqueror*.

The conceſſion ſaid to be made by Sir *B Shower*; and that it wa of conſequence to them to have denied the poſition, if capable c being denied; was in the caſe of an iſland not inhabited when fir paſſed by patent; ſo if a conqueſt gave any right, he ſaid it muſt b over the perſons of the conquered people, not over the country.

Upon a ſtate of the hiſtory of *Jamaica*, ſuppoſition of fact bein miſtaken, the argument that is applied fails. That poſition, ſo juſtl reprobated in *Calvin*'s caſe, is the point affirmed.

The opinion contended to be ſettled in that caſe of *Blanchard* an *Galdy*, is founded on my Lord *Coke*'s taking them, without civ policy, to be governed arbitrarily, according to the pleaſure of th King, as he ſhould think equity and juſtice; if the conceſſion b any thing it is to be applied to that point; which ought not to b named in a court of juſtice. This is the principal ground of a caſ which, from its inaccuracy, gained ſo little weight with your Lordſhip upon the laſt argument; if there had been others, the induſtr of the learned gentlemen who made the beſt of the laſt argumen for the defendant, would have produced them. Taking the expreſſion from a public writer, I apprehend my Lord *Coke* mean merely to ſtate the principle, not applied to any particular country and then the King, when applied to *England*, means not the Kin ſolely, but the King and parliament. It is the moſt natural an rational conſtruction, and is ſuch, I think, as the argument admits.

I think it can never eſcape your Lordſhip, that my Lord *Cok* writing without precedents or authority, muſt neceſſarily refer t the writers of public law. Mr. *Macdonald* has well obſerved, tho writers generally uſed the word Emperor or King as an arbitrar power including the whole. If Lord *Coke* is ſuppoſed to have lai down the point, it muſt have been from the hiſtory of his country and that the King from the earlieſt times exerciſed this prerogativ Though I ſhould not have laid great ſtreſs upon authorities deduce from dark and unſettled times, nor from our *Henries*, or even ou *Edwards*, to prove, from the exerciſe of an act of power, the legalit of the claim; (when even in that reign, when the great charter wa given, there were ſo many violations of it, and ſo many afterward and ſo many confirmations otherwiſe not neceſſary.) Though f theſe reaſons, I cannot allow much weight to acts in claim of a prerogative in thoſe reigns, there is no inſtance of an abſolute authorit by the King over a conquered country. I don't mean to waive th benefit of what has been ſo ingeniouſly argued, with reſpect to th introduction of laws into *Ireland* by the charter: But I think M *Macdonald* has produced an argument in proof, that the laws c *England* exiſted before that time, as it refers to them.

I think, therefore, an *Engliſh* conſtitution had paſſed; and in general that its part of the duty of the King to provide, that the *Engliſh* conſtitution ſhall be exerciſed every where over all the ſubjects of *England*, however conquered, however acquired, or wherever their ſituation.

That it is part of the duty of the King of England, to provide for the eſtabliſhment of the

conſtitution of England, over every country ſubject to the crown of England, however acquired or wherever ſituated.

The power of promulgation of laws, iſſuing of laws, the making preparations and proper regulations, for the introduction and execution of thoſe laws in a country ſo lately receiving them, is the *peculiar prerogative*. Though there is an antecedent title by birth or ſituation, it can only be exerciſed by means of the truſt repoſed in the crown, ſo as to be applied to the benefit of the public.

The enquiry is not what is expedient for the peculiar good of mankind ſo much as what is neceſſary or capable of being admitted. Where new laws have been to be introduced or old ones altered, it has always been by the act of the ſupreme legiſlation openly either here or over the ſtates in *Ireland*. If the providing for the execution of an antient right be called legiſlation, we will readily allow this legiſlation to have always exiſted in the King. But it is neceſſary to prove this authority that the King has *abrogated*, *altered* or *introduced* laws. This has not been done, the King has *never*; and the very expreſſion of an idea of ſuch a right has been rejected with reſentment and indignation as againſt the conſtitution.

And to ſay, if allowed, that the King legiſlatively introduced laws in *Ireland*, by providing for their being received and executed; is to ſay that he performed this executive truſt; which we all allow; and if this be meant a legiſlation, it is a ſalutary and neceſſary legiſlation. I know if it be, it hardly will be ſo interpreted as belonging to that name.

With regard to *Wales*, (I preſume many other inſtances will not be found of conquered countries,) the ſtatute has always been conſidered as an act of parliament.

If King Edward had been poſſeſſed of the power, he would not have received it from parliament.

The peculiar authority given to King *Edward*, which could have been by no means neceſſary, if there had been a legiſlative power abſolutely and independantly in him (and which power was never exerciſed, and held by the judges ſo ill agreeing with the conſtitution, as to be confined to the perſon of King *Edward* I.) is a ſtrong inference the regulation was not originally and properly in him, as of his own independant right, but derivatively from the parliament; and that in ſuch a manner as to be at leaſt confined to himſelf, and not extend to his ſucceſſors.

The King would never have furniſhed ſuch an argument againſ the exerciſe of legiſlative authority, had that power then reſided i him.

All the caſes have been the objects of parliamentary regulations If he had underſtood it to be of his right to give laws over thoſ countries arbitrarily, and parliament had recognized this claim; th power of making and altering, the power of abrogating would hav been in him, and we ſhould not have had the interpoſition of parliament.

From the author cited by Mr. *Macdonald*, I will ſtate the poſition.

That all conqueſts are made for the benefit of the conquerin ſtate; and whereever the people are compoſed and pay allegiance inſtead of conſtrained ſubmiſſion, then they are ſubjects; and ow obedience to the laws of the conquering ſtate, and hold their property from them.

When this conqueſt was made, from that hour when the King' right was recognized and a compoſition made, it was for the benefi of the people of this country. Here particularly, its conqueſt bein made with a view to colonization, it is eſtabliſhed by the beſt authority, that of Lord *Vaughan*, on the queſtion, whether a naturalization in *Ireland* made a man a natural-born ſubject of *Great Britain*?

Vattel's propoſition concurs with Lord Vaughan.

Lord *Vaughan*—A *conqueſt is not ſolely* for the *benefit of the conqueror*, but of the *ſubjects*; and thoſe who come to reſide there hav a right to acquire property; lands by purchaſe;—and be protected i all thoſe particulars, by the laws of their mother country.

The inhabitants then of *Grenada*, are the objects of all thoſe proviſions.

They may acquire property, with the right of reſidence and purchaſe; and have the other rights of *Britiſh* ſubjects.

As to expedience or value, we are not ſpeaking to the equalit but the legality; and what has taken a *part* has the ſame claim, t *half* or the *whole*.

The authority is inconſiſtent with that right which Mr. *Campbe* had as a reſident, if nothing elſe were affected by it.

It will be incumbent, by new arguments, to prove a power in the crown of diſpoſal of theſe acquiſitions, without the concurrence of the conſtitution.

Will this right bear the examination of the laws of *England*.

Ordinances of neceſſity, on inſtant emergencies, proviſions for the adminiſtration of conſtitutional rights—I ſhall not preſume to ſay how far theſe may be maintained: But they muſt expire with that neceſſity, and be occaſional and temporary only.

That this is not a temporary ordinance.

In the preſent caſe, no pretence of a neceſſity.

No pretence of neceſſity.

A conqueſt of the people, and not of the lands, muſt mean a power moſt extenſively taken in the times of barbariſm, but qualified in theſe times.

Both in the caſe of the conquered and conquering people, the laws of the general government are upon the conqueſt conveyed thither, as a common right of all the ſubjects: But they require to be actually carried into effect, maintained and executed by that power in which the execution of the laws is lodged, which, with us, is in the King. The *title* is there before the enjoyment; when the King has executed that truſt, then is the enjoyment.

On a conqueſt, the laws of the conquerors are immediately conveyed as the common right of all the ſubjects, conquerors and conquered.

The colonies cannot have the power of enforcing thoſe laws, they have the right, though the truſt is repoſed in the King to effectuate them.

But they require the executive power to inforce the actual exerciſe.

The King has given aſſurance that they ſhall be protected in all their rights, honours and poſſeſſions, and the free exerciſe of the *Roman* catholic religion—this to the conquered; ſhall the conquerors be in a worſe ſtate?

The King has provided, that, as immutable laws may become inconvenient, therefore there ſhall be a local one, ſubject to alteration by their own legiſlature.

A diſtinction is taken between *Grenada* and the other iſlands; I *anſwer* the grant is not a matter of grace and favour, but the diſcharge of a truſt. If it be a gift it is not *revocable*, but an irrevocable right; what diſtinction then between the other iſlands, whoſe rights the King has recognized by receiving the impoſts as a benevolence.

No diſtinction between Grenada and the other iſlands; the matter not being of favour, but of right antecedently, or at leaſt by the grant.

What

Second point, that the power of taxation if in the King before, is relinquiſhed by granting them aſſemblies to tax themſelves.

What power antecedent to the patent had exiſted in the King annihilated then. Even conſidering them as ſubject before to the ſol law of the conqueror, and not as ſubject to the legiſlative power of th ſtate, the King has waived the power of taxation if it were ad mitted he had it before, by granting them aſſemblies to tax them ſelves.

The conſtruction cannot be that the inhabitants are not to rea the benefit till a future time: This is ſo inconſiſtent with the end with the conſtruction in which the grants of the King are alway received, and the benefit deſigned, that it will find no weight wit your Lordſhip.

Taking it by way of argument that the conqueſt has annihilate their antient laws, their law cannot have been annihilated and non given them in their place.

If their ancient conſtitution is gone, the laws of *England* by thei proper force introduce themſelves.

It is a future grant, it is ſaid—when the power is given them t call aſſemblies, they have a proviſion for a legiſlature: I don't mea to derogate from the ſupreme legiſlature.

The aſſembly is to be called when circumſtances will admit an convenience ſhall require: So it is here; but yet it is the unalterabl privilege of this country.

The people to come, in confidence of the promiſe of the rights o *Britiſh* ſubjects, would in this conſtruction come, and find themſelves without one of the moſt remarkable of thoſe rights, and tha which ſecures all. They would, on coming to reſide, find themſelves ſubject to an arbitrary diſpoſal of their property, and migh have the whole taken away without their own conſent.

My Lord, on the whole of the caſe I preſume, whether as a con quered people or as colonies, they had a right to tax themſelves, and were not ſubject to impoſts under any claim of prerogativ without their own conſent.

Secondly, If they had been ſubject to taxes by prerogative, tha the King, by his proclamation, has concluded himſelf from thi right.

Mr. Attorney-General for the defendant.

Mr. Attorney-General—I have ever looked on this as one neceſ ſary ground of argument to a doubtful queſtion, that we ſhould ſe and attend to the nature of the claim, its fitneſs and expediency; and

no

not confound the idea of it by ſubſtituting, in its place, ſomething of a very different nature, and ſuppoſing that to be the right which is inſiſted on and intended to be proved.

If I had been to contend for an abſolute independent legiſlative power in his Majeſty, I have not that idea of authorities, or of the duties of my profeſſion, that I could have engaged myſelf in the taſk of ſupporting it. Nor ſhould I have thought it a propoſition fit to be be ſpoken of in any place, much leſs in a court of juſtice.

That the claim is not of an abſolute legiſlative power; but a ſubordinate legiſlation.

Without taking that for my ground, I mean to inſiſt that his Majeſty, as an article of executive power, has an authority, legiſlative in it's nature, but ſubordinate to the ſupreme legiſlature: A right of impoſing laws, and impowering others to impoſe them.

When I ſhall refer to corporations in *England* inveſted with powers to provide laws over part of the dominions of the King of *England*, from which they were diſtant, and not natives or inhabitants, I ſhall think myſelf entitled to contend that a power which he can delegate he can exerciſe in his own perſonal authority.

Such power delegated by the King to a corporation.

A method has been taken which requires the right to be conſidered in rather a different view, and examined in a different mode.

I think it has been endeavoured to be inſinuated, or rather declared, that in the article of conqueſt the laws of *England inſtantly* take place in the conquered country, and the conquering people carry the *Engliſh* laws with them. At the ſame time this point has been contended it was argued that the King, by his executive power, was to eſtabliſh thoſe laws.

By the ſubordinate authority to the Lords and Commons, which I conſider as much ſubordinate with regard to the dominions acquired to the King, as to the ſtate and dominions of the ſtate here, the King regulates the government, and requires impoſts from the country, in ſuch manner as he ſees requiſite.

But it is ſaid "only particular neceſſity juſtifies this claim, and it "muſt be only occaſional and temporary: When the ſovereign "authority has found it expedient to give laws for particular local ne"ceſſity, every individual carries with him all the laws of *England*;" that is, it may frequently happen laws ſubverſive of the laws given, the individual then will have a power denied to the Sovereign.

I have the authority of the ſame celebrated author (quoted on the other ſide) that there is no difference between a country conquered by the arms of another, and diſcovered. *Vat. ſ.* 203—10.

It was ſtated in the laſt argument, in order to ſhew wherever country is conquered it becomes part of the conquering people, an their laws are introduced with the conqueſt, that in *Calvin*'s caſ this point had been decided. The queſtion there was, whether th dominion of the conqueror or only the realm is included.

The laws of the conquered remain till altered. They have bee accuſtomed to them as modes of regulating and diſpoſing property They know no other: If there be better, and more complete in thei own nature, they are ſatisfied with their own; they have been accuſtomed to look up to theſe for protection on all occaſions, and t enjoy under them all the bleſſings and comforts they have enjoyed.

The queſtion is, whether by the laws of *Great Britain*, which ar the only rule here, the King has been adviſed juſtly, and acted within the compaſs of thoſe laws; or whether thoſe laws are exceeded This is merely the queſtion.

My reaſon for ſtating that dominion and property were acquired by conqueſt was, becauſe I ſhall infer that the conſtitution has intruſted the King with the diſpoſition of the property, and with the ordering of that dominion conquered; ſubject to the legiſlation o the country.

The King, both in conqueſts and colonies, has had this right There has not been an inſtance in which the King has not exerciſed the diſpoſition of the laws and property of the conquered country.

He has granted by his charter the iſland of *St. John*.

The King may exerciſe the right of diſpoſing the lands conquered. With reſpect to the laws, if we ſhould be carried back to the conqueſt of *Ireland*, (which, I think, remains in great doubt, whether by *Edward* or King *John*, or whether indeed completely till the reign of *Elizabeth*, at any period) the great loſs of the records of *Ireland* has made it impoſſible to go into an accurate diſcuſſion. Lord *Coke* is of opinion that, in point of fact, *Henry* the ſecond did give the laws of *England* to *Ireland*. King *John* was not, in truth, the Sovereign of *Ireland*; the actual Sovereign was *Henry* the third. It was not till after two deſcents had been ca[illegible] tha King *Henry* the third granted the *Engliſh* laws.

That this legiſlative power of the King was exerciſed over Ireland.

Suppoſing King *John* gave them thoſe laws, or that they were eſtabliſhed there before. It is contended this was a mere act of executive power. It will appear to what extent this power, cal executive, was carried.

On the ſubject of the *Engliſh* laws another ambiguity runs: That it is not only the laws of property and puniſhment of crimes, but the political laws and conſtitution of the country.

Suppoſe the King could not make, nor authorize to make laws occaſionally, the authority of parliament would be neceſſary to make the change.

With reſpect to *Scotland*, whenever they did call a parliament, it was by the King's command and inſtance, as at *Newark*; and it is too much to ſay that the King, in the character of an executive magiſtrate, has a right not only to create aſſemblies, but to appoint their meeting; and alſo that he carries with him, as a part of merely executive power, the power to alter laws.

So of Scotland.

With reſpect to *Wales*, though I believe in my conſcience it was in fact obtained by no better pretence than by that of the ſword, yet *Edward* did not conſider it as ſuch.

So of Wales.

Plowden, 126. There is no pretence that the ordinance then made was by King, Lords, and Commons: The King conſidered it as a fief under his own perſonal dominion.

With regard to many places in *France*, taken certainly by right of conqueſt, and ceded by the treaty of *Bretigny*, my doubt is, whether the *Engliſh* laws came thither.

With reſpect to the market of *Calais*, the reſort of *Engliſh* introduced the laws there, for convenience, but not in the caſtle, nor in the town of *Calais*.

That in the town and caſtle of Calais the Engliſh laws were not uſed, but in the ſtaple, for convenience.

With reſpect to *Minorca*, the laws of *England* do not take place there.

In the year 1713 they were referred to certain of the council, the archbiſhop of *Canterbury*, and others; in the year 1727 ſomewhat was done; in the year 17[illegible]0 a little more: In 1752 the privy council ſent over a great multitude of laws, but the war interfered.

[Lord *Mansfield*—This, I think, was after the complaint againſt Governor *Melville*.]

1606. King *James* grants a charter, with a power of making laws, and an excluſive fiſhery, from 34 to 35 degrees of latitude, to the corporation of *Plymouth*.

Grant in 1606 to the corporation of Plymouth.

It is ſaid this charter came into parliament. They came becauſe an excluſive fiſhery had been granted to a corporation reſiding at *Plymouth*, with a power of impoſing *penalties*.

The objection was, that at the time the corporation of *Plymouth* had not ſent colonies.

Charter of *Maſſachuſet*'s bay, with power to call aſſemblies, granted by the King; vacated and granted a-new after the revolution by King *William*.

I obſerve when a paſſage has been cited from the hiſtory of fo mer times it is the cuſtom to ſay they were bad times. Where ar we to look for the hiſtory of this country but in thoſe times, ſeparating the bad from the good?

St. Chriſtopher's.

In the caſe of *St. Chriſtopher's* there were given by eminent lawyers very diſtinct opinions, in favour of the right in the crown t impoſe duties. I don't recollect there was any evidence of want o exerciſe of that right, yet it was contended againſt becauſe an act o aſſembly twenty-five years after granted the duties.

Yet if one was to infer from every act that has been made in an of the political conſtitutions of this country there was no law befor that act was made, it would ſubvert moſt of the moſt important law of this country.

It was ſaid the King might have enacted a law, but only befor the times of the actual ſurrender; but that after it ſurrendered to th ſovereignty it becomes part of the conquering ſtate in a differen right; and the ordinances muſt be only *temporary* till the King an parliament provides others.

From the moment the conqueſt has eſtabliſhed itſelf, from th inſtant in which he has compelled the inhabitants to give up the arms, there is not any hour in which the parliament cannot bi it.

Suppoſe this ordinance had been before the capitulation and ce ſion, would it have ceaſed becauſe by the treaty of peace the Ki of *France* ſays he cedes all his right to the King and crown of *Gr* *Britain*. What does the treaty more than affirm the right of *Gre* *Britain*, by ceding all right or pretenſions of right. If his Maje thought fit, after having impoſed one ſort of laws, to give anoth repugnant ſort of laws, or the parliament were to do this, it wou be by an authority acting in ſubverſion of the firſt.

This drives on to another inconſiſtency upon the claim of political liberty.

The King by his conqueſt acquired a power to provide laws for his ſubjects, a power which has been ſo repeatedly and extenſively exerciſed in other inſtances.

Has the King ſuperſeded that right? The proclamation, it is ſaid, gives the *Engliſh* laws to all the ſubjects. It was ſaid that it *preſumed* the laws of *England* prevailed in the country, and that it made a proviſion in the commiſſion to be given to the judges. What, that they ſhould bring thoſe laws which, by this hypotheſis, were there before!

The proclamation might convey the *Engliſh* laws, but not the political and conſtitutional ſyſtem in general in this kingdom.

That the proclamation did not convey the political conſtitution of this kingdom.

The promiſe is ſaid to be the ſame which the King gives here. I don't know by what record it appears that the King has engaged himſelf to his ſubjects of this country, that, when convenience ſhall permit, or occaſion ſhall require, he will permit a parliament to be called.

The King, by his commiſſion, empowers the governor to call a parliament when he ſhall think convenient, or receive inſtructions: And his authority was ſo much executory, that he might have eſtabliſhed aſſemblies either of the five iſlands *together*, or GRENADA apart and *ſeverally*.

That by the proclamation it was left diſcretionary, whether the five iſlands ſhould form one aſſembly, or each apart.

It would be of the utmoſt danger to this conſtitution to ſay, till the King or parliament gives them a conſtitution he might act in full power, without any laws to decide.

The commiſſion to call aſſemblies was not *executed* till above a year after the patent impoſing the duty.

The commiſſion to call aſſemblies not executed till above a year after the duties impoſed.

In the caſe of chartered governments the argument would, undoubtedly, take a different turn. It might be ſaid a charter is a grant of an intereſt to perſons named in the grant; but in this nothing could paſs, but the conſtitution exiſting till ſome new grant.

The ſpecial verdict has not found the time in which the commiſſion paſſed the great ſeal. The patent paſſed for raiſing the tax in *July*; the governor did not go over till *October*; both came together. The King, therefore, had introduced his claim to the impoſt on the country *prior* to the time in which any aſſembly could be called; for his right was introduced the very inſtant of the governor's land-

The patent for raiſing the impoſt arrived with the governor.

ing: And the elder right, in the King eſpecially, will be preferre above all, when it appears the proclamation could not be intende to waive the impoſt.

Serj Glynn.

In reply Mr. Serjeant *Glynn*—Before I go into the genera queſtion I ſhall ſpeak upon two important points, though an end i made of the caſe, and the object ſatisfied to the plaintiff by th deciſion of the laſt. The other is ſo great and important an one i the general conſideration that I am perſuaded your Lordſhip will no paſs over in judgment.

The tax is contended to be *legally* levied, upon a claim of whic the very ſtating of the caſe proves the *illegality*.

My learned friend has ſet out with diſavowing the claim of a *abſolute independent* ſovereignty in the crown; but he has maintained his argument and was obliged to maintain his argument upon it.

That the idea of it's being a ſubordinate authority, becauſe the King with the parliament may annul it, is fallacious, the King himſelf being one eſſential part of the parliament.

He ſays it is a *ſubordinate* legiſlature. A *ſubordinate legiſlature*, i this ſenſe at leaſt, is difficult to be conceived to thoſe who know no how to make dependence conſiſt with independence: But the ſtat of *Grenada* diſtinguiſhes itſelf. It is a tax impoſed by an act of le-giſlative power, which includes the entire legal ſovereignty; but it i not an uncontrouled authority, becauſe the King, with conſent o parliament, may depart from this claim, ſo as to bind his ſucceſſors The ſupreme legiſlature may repeal it. The King makes an eſſen-tial part of that legiſlature. Is it a mark of a limited *ſubordinat* authority, that he can impoſe *without* them what they cannot tak away *without him?* And that he may depart from this is what an man may do in any inſtance of the moſt uncontrouled legiſlative authority.

My learned friend ſays it is a ſubordinate act of legiſlation; an ac of *execution*, not of legiſlation. It does not depend upon the Kin whether the laws of *England* introduce themſelves, becauſe the parliament may alter or appoint laws. The King may levy taxes by hi ſole authority, which ſhall ſtand in force till parliament repeals them which they *cannot* without *him*.

That there can be no medium in this thing between an abſolute legiſlative power in the perſon of the King and an executive truſt.

I believe my learned friend will hardly prove this power veſted i the *perſon* of the King. It was the great point our *Hampden* contended, that no tax can be impoſed by the authority of the King It muſt, therefore, depend ſolely upon the queſtion, whether th King has an abſolute independent legiſlation; or whether the powe of the crown is not truly *executive*.

The promulging and introducing adminiſtration of the laws of *England* we admit to be in the King, as his peculiar and neceſſary truſt; the making, altering, or ſuſpending of thoſe laws, we deny.

Notwithſtanding the obſervation on the government of *Scotland*, the ſtates were convened in the firſt inſtance of *Edward*'s claim: And if he claimed it as a fief, and obtained as a conqueror, ſtill he governed it as a King of *England*, with executive and not legiſlative authority.

As to the claim of a feodal duchy in *Wales*, it does not appear that the King ever introduced any laws but the laws of *England*: And when he conſiders it expreſsly, as intimately and vitally connected with *England*, as a part to the body, in one entire dominion, can it be doubted whether he underſtood that he was to govern it by the laws of *England*.

Wales in proprietatis dom. totaliter cum integritate converſa et tanquam pars corpori annexa et unita.

Whether Lord *Coke* is right in ſuppoſing King *John*, or any other prince, introduced the laws of *England* into *Ireland*, I don't think is material; unleſs it appears ſome prince, by his authority, made laws and regulations there, without the concurrence of the *Engliſh* parliament.

That it does not appear any prince made laws for Ireland independently of the Engliſh parliaments.

The King has the power becauſe it has been *delegated*. The caſe was not that the King, in the grant to the corporation, made laws to bind *others* without their conſent; but he empowered them to make laws which ſhould bind *themſelves*. The caſe is ſo far from proving a power to make laws *contradictory* to the laws of *England*, that it only proves the power of the King to *convey* the laws of *England*.

The caſe of the corporation of Plymouth was a power delegated to make laws to bind themſelves.

And becauſe the King can erect a corporation which ſhall make *bye-laws* obligatory upon the particular community, therefore the King, it is inferred, can make laws which ſhall bind thoſe *who never* gave their conſent to them.

The ſtrongeſt authorities, uniform experience, as well as the principles of the conſtitution, and rules of law, are againſt it.

Selden's opinion is againſt it, and the other great lawyers. It has the teſtimony of the beſt conſtitutional lawyers, of which no age was ever more fruitful than that of *James* the firſt, to negative it. It ought to have been not unſupported by precedents. The character of the prince who is made the example of the claim ought to have been other: He ought to have been a prince who *hated* prerogative; who was deſirous of keeping the right of the crown within it's conſtitutional limits, and by no means of extending it beyond.

Authorities.

The next are mere private opinions given by great lawyers, but in *private*. Though they will have great weight, as far as extra-judicial opinions in courts of law, they are not leading principles of deciſion: And had any private opinion been deciſive this cauſe had never been now before the court. No man reveres opinions of men of great abilities more; but there is not the opinion of any man which, ſtanding ſimply on the footing of authority, I ſhall not think it permitted to queſtion: And even the greateſt have been heretofore queſtioned ſucceſsfully. I never could be deterred by great opinions when I conſidered by what authorities the liberty of the preſs has been oppoſed; by what authorities the claim of ſhip-money was ſupported; and what the event was upon both thoſe queſtions.

What was done after the revolution only a temporary proviſion.

What was done upon the forfeiture of the charter, before the revolution, is no authority; but rather an argument of error. *After* the revolution ſome lawyers gave their opinion for collecting the revenues as they uſed to be collected; this was done only in the interval of ſuſpenſion of legiſlature.

A queſtion of this nature, a power of a kind like this is not to be gathered from authorities and circumſtances ſuch as have been ſtated. Mr. Attorney-general was ſuppoſing an inſtant abrogation of all former laws. I did not ſay ſo when it was a conqueſt. There are ſome unalterable laws to continue. As to the objection made of claiming of property, the mode muſt remain till the King appoints by his executive power.

No argument or diſpute about the property of the ſoil.

My Lord *Vaughan* ſays the ſubjects don't acquire a property in the ſoil. If the inhabitants had been turned out of it it would have been in the King. In the idea of this country the property was originally in the King of *all* lands, If Mr. Attorney-general has been contending on this as a *feodal* right the argument would have had weight; but we are not arguing for the property of the ſoil.

The ſubjects of *England* have a *right* to the *Engliſh laws:* They have a *right* to *aſſemble:* And the reaſon why the King never ſays to them that he will call aſſemblies as ſoon as convenience permits and occaſion ſhall require is, becauſe in this country convenience *always* permits, and occaſion requires. But ſtill the *truſt* of calling them is repoſed in the King.

Mr. Attorney-general, after having diſcuſſed the point of ſovereignty in the caſe of *Ireland*, with reſpect to their aſſemblies, has ſaid this is in execution of authority in the King; if ſo then the laws were there before, and aſſemblies called upon the ſame terms as in *England*. And that the acts concerning them were by authority of parliament.

With reſpect to the power of the King to make laws.

He can make no other laws than what ſhall have been made by the conſtitutional aſſemblies; he can repeal none; nor *alter* without them.

Mr. Attorney-general ſays that by his proclamation the King promiſes that he will grant them the privileges of *Britiſh* ſubjects; but then this promiſe cannot take effect before the governor lands, and an aſſembly is called; and immediately on his landing, and before an aſſembly can be called, he has a right to levy impoſts.

I take the conſtruction to be, that the promiſe takes place from the time of iſſuing it: A conſtitution takes place *immediately*. We are not leſs governed by the laws of this country becauſe a parliament is not *conſtantly* ſitting.

That the promiſe is obligatory from the time of iſſuing it.

This cannot be diſtinguiſhed from the caſe of any other colony; and if the power claimed be in this caſe diſallowed, the colonies in general will then act all of them with the ſame dependence on the ſupreme legiſlature, and the ſame conformity in the principles of the *Britiſh* conſtitution. If otherwiſe, there will be *Britiſh* ſubjects under the ſame name, and with the ſame nominal rights, ſome free and others in unconſtitutional ſubjection.

Lord *Mansfield*—I don't remember it's being argued on this caſe on the queſtion whether there is any authority which conſiders *Bretigny* as a part of the dominions of the crown of *England*. *Aquitaine* and *Poictou* he held as heir to the houſe of *Anjou*.

The parts ſeparated from the crown, and conſidered as feodal, were governed by a deſpotic authority. It appears that *Calais* had the proceſs and judicial writs of this court. Writs of error returnable to this court.

How do you underſtand the capitulation?

A ceſſion is not neceſſary to a *conqueſt*; it is not neceſſary for the right. *Jamaica never* has been ceded, I believe, to this hour.

How do you underſtand the capitulation? There is an article that they ſhall pay no other duties but what they paid to the King of *France*.

Mr. Juſtice *Aſton*—Firſt of all in this ſpecial verdict the articles of capitulation, ſome of them, are ſtated. I don't underſtand how the capitulation and treaty of peace agree. But I am to judge upo the verdict.

28 *November*. *Campbell* and *Hall*.

Judgment of the court was this day given by Lord *Manſfield*.

In this cauſe of *Alexander Campbell* againſt *William Hall*.

Caſe.

This is an action brought by the plaintiff, who is a natural-bor ſubject of *Great Britain*, and who, upon the third of *May*, 1763 purchaſed lands in the iſland of GRENADA. And it is brough againſt the defendant, *William Hall*, who was collector for his Ma-jeſty at the time of levying the impoſt, and of the action brought of a duty of four and an half *per cent.* upon goods exported from th iſland of *Grenada*. And it is to recover a ſum of money which wa levied by the defendant and paid by the plaintiff, as for this duty o four and an half *per cent.* for ſugars which were exported from th iſland of *Grenada*, from the eſtate and by the conſignment of th plaintiff.

And the caſe is laid upon money had and received; and plaintiff as for money paid *without conſideration*, the duties having been impoſe without ſufficient or lawful authority to warrant the ſame, demand judgment to recover the ſame againſt the defendant.

And it is ſtated in the ſpecial verdict that the money is not pai over, but continues in the defendant's hands, by conſent of the at-torney-general, for his Majeſty, in order that the queſtion may b tried.

The ſpecial verdict ſtates *Grenada* to have been conquered by th *Britiſh* arms from the *French* King on the ſeventh of *February* 1762. The iſland of *Grenada* ceded by capitulation; and the ca-pitulation upon which they ſurrendered was by reference to the capi-tulation upon which the iſland of *Martinico* had been ſurrendered.

The ſpecial verdict then ſtates ſome articles of that capitulation particularly the fifth, which grants that *Grenada* ſhall be governe by it's own laws till his Majeſty's pleaſure be known.

Continuance of property, religion, honours, privileges, and ex-emptions, is demanded. They are referred to the article laſt ſtate for anſwer, which is, that the inhabitants, being ſubjects of *Grea Britain*, will enjoy their property, and the ſame privileges, derive from their ſubjection, as his Majeſty's other iſlands.

Eighth article, That they ſhall be ſubject only to the capitation tax impoſed by his Majeſty the King of *France*, expences of juſtice and public government to be paid out of the King's domain.

Referred to the 7th article, which ſtates the rule—and refers to the duties paid by the inhabitants of the Leeward iſlands.

The next inſtrument is the treaty of peace the 10th of *February* 1763, which ſtates the ceſſion, and other articles not material.

The next and material inſtrument which they ſtate is a PROCLAMATION under the great ſeal, the 7th of *October* 1763, reciting thus:

" Whereas it will greatly contribute to the ſettling of our ſaid " iſlands, of which *Grenada* is one, that they be informed of our " love and paternal care for the liberties and rights of thoſe who " are or ſhall be inhabitants thereof; we have thought fit to pub- " liſh and declare by this our proclamation, that we *have* by our " *letters patent* under our great ſeal of *Great Britain*, whereby our " ſaid governments are conſtituted, given expreſs power and direc- " tion to our governors of our ſaid colonies reſpectively, that ſo ſoon " as the ſtate and circumſtances of the ſaid colonies will admit there- " of, they ſhall, with the advice and conſent of our ſaid council, call " and ſummon general aſſemblies, in ſuch manner and form as is uſed " in the other colonies under our immediate government. And we " have alſo given power to the ſaid governors, with the advice and " conſent of our ſaid council and aſſembly of REPRESENTATIVES " as aforeſaid, to make, conſtitute and ordain LAWS, ſtatutes and " ordinances for the public peace, welfare and good government of " our ſaid colonies and the inhabitants thereof, as near as may be " agreeable to the laws of *England*, and under ſuch regulations and " reſtrictions as are uſed in our other colonies."

Then follow letters patent under the great ſeal, or rather a proclamation of the 26th of *March* 1764, whereby the King recites, that he had ordered a ſurvey and diviſion of the ceded iſlands, as an invitation to all purchaſers to come and purchaſe upon terms and conditions ſpecified in the proclamation.

The next inſtrument ſtated in the verdict, letters patent on the 9th of *April* 1764, gives commiſſion and authority to *Robert Melville*, Eſq; appointed Governor of this iſland of GRENADA, to ſummon ASSEMBLIES as ſoon as the ſituation and circumſtances of the iſland would admit; and to make laws in all the uſual forms, with reference to the other plantations where aſſemblies are eſtabliſhed.

The Governor arrived in GRENADA the 14th of *Decembe* 1764; before the end of 1765, particular day not ſtated, the aſſemblies actually met: But before the arrival of the Governor in *Grenada*, indeed before his commiſſion, and before his departure from *London*, there is another inſtrument upon the validity of which th *whole* turns.

Letters patent under the great ſeal, bearing date the 20th of *Jul* 1764, reciting that in *Barbadoes*, and all other of the *Britiſh* Leeward iſlands, a duty of four and an half *per cent.* is paid upon good exported; and reciting farther:

> " Whereas it is convenient and expedient, and of great impor
> " tance to our other ſugar colonies, that the like duties ſhould tak
> " place in *Grenada*; we do hereby by virtue of our authority an
> " prerogative royal ordain that an IMPOST of four and an half *pe*
> " *cent.* in ſpecie ſhall, from and after the 29th day of *Septembe*
> " next, be raiſed and paid to us, our heirs and ſucceſſors, for an
> " upon all dead commodities of the growth or produce of our ſai
> " iſland of GRENADA that ſhall be ſhipped off from the ſame, i
> " lieu of all cuſtoms and impoſt duties hitherto collected upon good
> " imported and exported into and out of the ſaid iſland, under th
> " authority of his moſt Chriſtian Majeſty, and that the ſame ſhal
> " be collected: Then it goes on with reference to the iſland o
> " *Barbadoes* and the other Leeward iſlands."

The jury find that in fact ſuch duty of four and an half *per cent* is paid to his Majeſty in all the *Britiſh* Leeward iſlands.

And they find ſeveral acts of aſſembly which are referrible to th ſtate of the ſeveral iſlands, and which I ſhall not ſtate, as they ar public, and every gentleman may have acceſs to them.

Theſe letters patent of the 20th of *July* 1764, with what I ſtate in the opening, are all that is material in this ſpecial verdict.

Upon the whole of the caſe this GENERAL QUESTION ariſe being the ſubſtance of what is ſubmitted to the court by the verdict " *Whether* theſe letters patent of the 20th of *July* 1764, *are goo* " *and valid to abrogate the French duties, and in lieu thereof to impoſe this duty of four and an half per cent.*" which is paid by a the Leeward iſlands ſubject to his Majeſty.

That the letters are void has been contended at the bar, upon tw points.

1ſt. That although they had been made *before* the proclamation, the King by his PREROGATIVE *could not* have impoſed them.

1ſt Point.

2dly, That although the King had ſufficient authority before the 20th of *July* 1764, he had *diveſted* himſelf of that authority by the proclamation.

2d Point.

A great deal has been ſaid and authorities cited—relative to propoſitions in which both ſides *exactly* agree, or which are *too clear* to be denied. The ſtating of theſe will lead us to the ſolution of the firſt point.

Propoſitions.

1ſt. A country conquered by the *Britiſh* arms becomes a DOMINION of the KING in right of his CROWN, and therefore neceſſarily ſubject to the *legiſlative* power of the PARLIAMENT of GREAT BRITAIN.

to the crown, and therefore ſtate or legiſlation of

1ſt. That a country conquered by the Britiſh arms becomes ſubject Great Britain.

2dly, The conquered inhabitants once received into the conquerors protection become SUBJECTS; and are univerſally to be conſidered in that light, not as ENEMIES or ALIENS.

2d. The conquered are ſubjects, not aliens or enemies.

3dly, ARTICLES of CAPITULATION upon which the conqueſt is ſurrendered, and treaties of peace by which it is ceded, are SACRED and INVIOLABLE, according to their true intent.

3d. Articles of capitulation and ceſſion ſacred and inviolable.

4thly, The LAW and LEGISLATION of *every* dominion EQUALLY *affects* ALL PERSONS and property *within* the LIMITS thereof, and is the true RULE for the deciſion of all queſtions which ariſe there: Whoever purchaſes, ſues or lives there, puts himſelf under the laws of the place, and in the ſituation of its inhabitants. An *Engliſhman* in *Minorca* or the *Iſle* of *Man*, or the plantations, has no diſtinct right from the natives while he continues there.

4th. The law and legiſlation of every country equally affects every ſubject within its limits.

5thly, LAWS of a CONQUERED COUNTRY *continue* until they are *altered* by the CONQUEROR. The *juſtice* and *antiquity* of this maxim is uncontrovertible; and the abſurd exception as to pagans, in *Calvin's* caſe, ſhews the univerſality of the maxim. The exception could not exiſt before the Chriſtian æra, and in all probability aroſe from the mad enthuſiaſm of the Croiſades.—In the preſent caſe the capitulation expreſsly provides and agrees, that they ſhall continue to be governed by their preſent laws, until his Majeſty's pleaſure be further known.

5th. The laws of a conquered country, chriſtian or pagan, continue until altered by the conqueror.

6thly, If the KING has power (and, when I ſay the King, I mean in this caſe to be underſtood "*without* concurrence of PARLIAMENT") to make new laws for a CONQUERED COUNTRY, this

6th. That the King ſolely can make no laws for a conquered country, contrary to fundamental principles; againſt the laws of trade or authority of parliament,

being a power SUBORDINATE to his own authority, as a part o the *ſupreme legiſlature* in PARLIAMENT, he can make none whic are contrary to *fundamental* PRINCIPLES; *none* excepting from th LAWS of TRADE or authority of PARLIAMENT, or PRIVILEGES *excluſive* of his other ſubjects.

or giving privileges excluſive of his other ſubjects.

The preſent PROCLAMATION is an act of this *ſubordinate legiſlative* power: If made before the 11th *October* 1763, it would hav been made on the moſt *reaſonable* and *equitable* grounds; putting th iſland of *Grenada* on the ſame footing as the other iſlands.

If *Grenada* paid *more* duties, the injury would have been to *her* if leſs, to the *other* iſlands.

It would have been carrying the CAPITULATION into *execution* which gave hopes, if any *new* duties more were laid on, their condition would be the ſame as that of the other Leeward Iſlands.

The only queſtion which remains then is, whether the King ha power after the 4th of *February* 1763, of *himſelf*, to impoſe thi duty.

Taking theſe propoſitions to be granted, he has a legiſlative powe over a conquered country, limited to him by the conſtitution, an ſubordinate to the conſtitution and parliament; and a power t grant or refuſe capitulation.

That the jus belli et pacis is intruſted with the King, property in the conquered lands and terms of conqueſt, and the conſtitution of the conquered country.

If he *refuſes*, and puts to the ſword or extirpates the inhabitant of a country, obtaining it by conqueſt, the LANDS are HIS; and i he plants a COLONY, the new ſettlers ſhare the land between them *ſubject* to the PREROGATIVE of the CONQUEROR. If he receive them into obedience and grants them property, he has power to fi a TAX. He is *intruſted* with the TERMS of making peace at hi DISCRETION; and he may *retain* the conqueſt or yield it up, o ſuch CONDITION as he ſhall think fit to agree.

This is *not* a matter of *diſputed right*; it has hitherto been *uncontroverted* that the KING may change PART or ALL of the POLITICAL FORM of GOVERNMENT over a CONQUERED DOMINION.

Hiſtorical application of theſe principles.

To go into the hiſtory of conqueſts made by the crown of *England*. The alteration of the laws of *Ireland*, has been much diſcuſſed by the lawyers and writers of great fame. *No* man ever ſai the change was made by the PARLIAMENT; *no* man, unleſs perhaps Mr. *Molyneux*, ever ſaid the King could not do it.

Th

The fact, in truth, after all the reſearches that could be made, comes out clearly to be as laid down by Lord Chief Juſtice *Vaughan*.

Ireland.

"IRELAND received the LAWS of ENGLAND by the charters "and COMMAND of *H.* 2. King *John*, *H.* 3. and he adds, *&c.* to "take *Edward*, and the ſucceſſors of the princes named. That "the charter 12 King *John*, was by aſſent of parliament in *Ireland*, "he ſhews clearly to be a miſtake. Whenever a PARLIAMENT "was called in *Ireland*, that change in their conſtitution was "without an act of parliament in ENGLAND, and therefore muſt "have been derived from the King."

Mr. *Barrington* is well warranted. The 12th of *Edward* 1ſt. called the ſtatute of WALES, is certainly no more than a *regulation* made by the KING as *conqueror*, for the government of the country, which the preamble ſays was then totally ſubdued; and however for purpoſes of policy he might think fit to claim it as a fief, appertaining to the realm of *England*, he could never think himſelf intitled to make laws, without *aſſent* of parliament, to bind the ſubjects of any part of the realm. Therefore, as he did make laws for *Wales* without aſſent of parliament, the clear conſequence is, he governed it as a conqueſt: Which was his title in fact, and the feodal right but a *fiction*.

Berwick, after the conqueſt of it, was governed by charters from the crown, till the reign of *James* the 1ſt. *without* interpoſition of PARLIAMENT.

Gaſcoigne, Guyenne and Calais.

Whatever changes were made in the laws of *Gaſcony*, *Guyenne* and *Calais*, muſt have been under the King's authority; if by act of parliament that act would be *extant*, for they were conquered in the reign of King EDWARD the THIRD; and ALL the acts from that reign to the preſent time are *extant*; and in ſome acts of parliament there are commercial regulations, relative to each of the conqueſts which I have named; *none* making any change in their *conſtitution* and *laws*.

Yet as to *Calais*, there was a great change made in their conſtitution, for they were ſummoned by writ to ſend burgeſſes to the *Engliſh* parliament; and as this was not by act of parliament, it muſt have been by the ſole act of the King.

Gibraltar.

With regard to the inhabitants, their property and trade, at *Gibraltar*, the King, ever ſince that conqueſt, has from time to time made orders and regulations ſuitable to the condition of thoſe who live, trade, or enjoy property in a garriſon town.

Mr.

Minorca.

Mr. Attorney-General has alluded to a variety of inſtances, ſev-ral within theſe twenty years, in which the King has exerciſed legiſlation over *Minorca*. In *Minorca* it has appeared lately, that there are and have been for years back a great many inhabitants of worth, and a great trade carried on.

That as in Minorca the Spaniſh conſtitution ſubſiſts, ſo in Grenada, before the 7th of October 1763, the French.

If the King does it there as coming in the place of the King of SPAIN, becauſe their old conſtitution continues (which by the by is another proof that the conſtitution of *England* does not neceſſarily follow a conqueſt by the King of *England*) the ſame argument applies here; for before the 7th of *October*, 1763, the conſtitution of GRENADA continued, and the King ſtood in the place of their former Sovereign.

New York.

After the conqueſt of *New York*, in which moſt of the old *Dutch* inhabitants remained, King *Charles* the ſecond *changed* their *conſtitution* and political form of government, and granted it to the Duke of *York*, to hold from his crown under all the regulations contained in the letters patent.

Reaſon aſſigned why there are no caſes. That there never was a doubt but the King had a legiſlative power over a conquered country.

It is not to be wondered that an adjudged caſe in point is not to be found; no diſpute ever was ſtarted before upon the King's *legiſlative* right over a conqueſt: It never was denied in a court of law or equity in *Weſtminſter-Hall*, never was queſtioned in parliament.

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Lord *Cke*'s report of the arguments and *reſolutions* of the judges in *Calvin*'s caſe lays it down as clear. (And that ſtrange extrajudicial opinion, as to a conqueſt from a pagan country, will not make reaſon not to be reaſon, and law not to be law, as to the reſt.) And the book ſays,* that if a King—I omit the diſtinction between a chriſtian and infidel kingdom, which as to this purpoſe is wholly groundleſs, and moſt deſervedly exploded—" If a King come to a kingdom by conqueſt, he *may*, at his *pleaſure*, *alter* and *change* the laws of that kingdom; but, until he doth make an alteration, the *ancient* laws of that kingdom *remain*: But if a King hath a kingdom by deſcent, there, ſeeing *by* the LAWS of the kingdom he doth inherit the kingdom, he CANNOT change the laws of HIMSELF *without* conſent of PARLIAMENT. (Plainly ſpeaking of his own country where there *is* a PARLIAMENT.)

" ALSO, if a KING hath a kingdom by CONQUEST, as King *Henry* the ſecond had IRELAND, AFTER King *John* had given to them, being under his obedience and ſubjection, the laws of *England* for the government of their native country, *no ſucceeding King could alter the ſame without parliament*. Which is very juſt

"and it neceſſarily includes that King *John* himſelf could not al-
"ter the grant of the laws of *England*."

Beſides this, the authority of two great names has been cited, who took the propoſition for granted. And though opinions of counſel, whether acting officially in a public charge or in private, are not properly authority to found a deciſion, yet I cite them;—not to eſtabliſh ſo clear a point, but to ſhew that when it has been matter of legal enquiry the anſwer it has received, by gentlemen of eminent character and abilities in the profeſſion, has been immediate and without heſitation, and conformable to theſe principles.

In 1722, the aſſembly of *Jamaica* refuſing the uſual ſupplies, it was referred to Sir *Philip Yorke* and Sir *Clement Worge*, what was to be done if they ſhould perſiſt in their refuſal.

The opinion of Sir Philip Yorke and Sir Clement Worge in 1722, with reſpect to Jamaica.

Their anſwer is—"that if *Jamaica* was ſtill to be conſidered as
"a *conquered* country, the King had a right to lay taxes upon the
"inhabitants; but if it was to be conſidered in the ſame light as
"the other colonies, no tax could be impoſed upon the inhabitants,
"but by an aſſembly of the iſland, or by an *act* of parliament."

The diſtinction in law between a conquered country and a colony they held to be clear and indiſputable; whether, as to the caſe before them of *Jamaica*, that iſland remained a conqueſt or was made a colony, they had not examined.

Hardly any of the old inhabitants.

I have, upon former occaſions, traced the conſtitution of *Jamaica* as far as there are books or papers in the offices: I cannot find any *Spaniard* remained upon the iſland ſo late as the reſtoration; if any, they were few.

A gentleman, to whom I put the queſtion on one of the arguments in this cauſe, ſaid he knew of no *Spaniſh* ſlave of the white inhabitants of *Jamaica*; but there were amongſt the negroes.

Original conſtitution of the colony in Jamaica.

The King, I mean *Charles* the ſecond, after the reſtoration invited ſettlers by proclamation, promiſing them his protection. He appointed at firſt a governor and council only; afterwards he granted a commiſſion to the governor to call an ASSEMBLY.

The *conſtitution* of *every* province immediately under the King has ariſen in the ſame manner; not by the grants, but by the commiſſion *ſubſequent* to call an aſſembly. And therefore all the *Spaniards* having left the iſland, or having been killed or driven out of it, the firſt ſettling was by an *Engliſh* colony, who under the authority of the King planted a *vacant* iſland, belonging to him in right of his crown.

The like is the caſe of the iſlands of *St. Helena* and *St. John's*, mentioned by Mr. Attorney-General.

A maxim of conſtitutional law with all the judges in *Calvin*'s caſe, and two ſuch men in modern times as Sir *Philip Yorke* and Sir *Clement Worge*, I take it for granted will acquire ſome authority, even if there were any thing which otherwiſe made it doubtful; but on the contrary no book, no ſaying of a judge, no not even an opinion of any counſel public or private, has been cited; no inſtance is to be found in any period of our hiſtory where it was ever queſtioned.

Opinion on the ſecond point.

The counſel for the plaintiff undoubtedly laboured this point from a diffidence what might be our opinion on the *ſecond*.

But upon *full conſideration* we are ALL of opinion that BEFORE the 20th of *July*, 1764, the King had *precluded* himſelf from an exerciſe of the legiſlative authority by virtue of his prerogative, which he had before over the iſland of GRENADA.

The firſt and material inſtrument is the proclamation of the 7th of *October* 1763. See what it is that the King ſays, and with what view he ſays it; how and to what he engages himſelf and pledges his word, "whereas it will greatly contribute to the *ſpeedy ſettling* "our ſaid new governments, that our loving ſubjects ſhould be in-"formed of our paternal care for the *ſecurity* of the *liberties* and "*properties* of thoſe who *are* and SHALL become inhabitants there-"of; we have thought fit to *publiſh* and *declare* by this our *procla-*"*mation*, that we have in the letters patent under our great ſeal of "*Great Britain*, by which the ſaid governments are conſtituted, "given expreſs power and direction to our governors of our ſaid "colonies reſpectively, that, ſo ſoon as the ſtate and circumſtances "of our ſaid colonies will admit thereof, they ſhall with the ad-"vice and conſent of the members of our council ſummon and call "general aſſemblies (and then follow the directions for that pur-"poſe.) And to what end? To make, conſtitute and ordain LAWS, "ſtatutes, and ordinances, for the public peace, welfare and good of "our ſaid colonies (of which this of *Grenada* is one) and of the "people and inhabitants thereof, *as near as may be agreeable to the* "*laws of England.*"

With what view is the promiſe reciting the commiſſion actually given? To invite ſettlers; to invite ſubjects. Why? The reaſon is given. They may think their liberties and properties more ſecure when they have a legiſlative aſſembly. The governor and council depending on the King he can recall them at pleaſure, and give a new frame to the conſtitution; but not ſo of the other which has a negative on thoſe parts of the legiſlature which depend on the King.

Therefore that aſſurance is given them for the ſecurity of their liberties and properties, and with a view to invite them to go and ſettle there after this proclamation that aſſured them of the conſtitution under which they were to live.

The 26th of March 1764.

The next act is of the 26th of *March* 1764, which, the conſtitution having been eſtabliſhed by proclamation, invites further, ſuch as ſhall be diſpoſed to come and purchaſe, to live under the conſtitution. It ſtates certain terms and conditions on which the allotments were to be taken, eſtabliſhed with a view to permanent colonization and the encreaſe and cultivation of the new ſettlement.

Patent of the 9th of April 1764.

In farther confirmation, on the 29th of *April* 1764, three months before the impoſt in queſtion was impoſed, there is an actual commiſſion to Governor *Melville*, to call an aſſembly as ſoon as the ſtate and circumſtances of the iſland ſhould admit.—You will obſerve in the proclamation there is no legiſlature reſerved to be exerciſed by the King, or by the governor and council under his authority, or in any other method or manner until the *aſſembly* ſhould be called: The promiſe imports the contrary; for whatever conſtruction is to be put upon it, (which perhaps it may be ſomewhat difficult to purſue through all the caſes to which it may be applied) it apparently conſiders laws then in being in the iſland, and to be adminiſtered by courts of juſtice; not an interpoſition of legiſlative authority between the time of the promiſe and of calling the aſſembly.

It does not appear from the ſpecial verdict when the firſt aſſembly was called; it muſt have been in about a year at fartheſt from the governor's arrival, for the jury find he arrived in *December* 1774, and that an aſſembly was held about the latter end of the year 1765. So that there appears to have been nothing in the ſtate and circumſtances of the iſland to prevent calling an aſſembly.

We therefore think by the two proclamations and the commiſſion to Governor *Melville*, the King had immediately and irrevocably granted to all who did or ſhould inhabit, or who had or ſhould have property in the iſland of GRENADA—in general to all whom it ſhould concern—that the ſubordinate legiſlation over the iſland ſhould be exerciſed by the aſſembly with the governor and council, in like manner as in the other provinces under the King.

And therefore, though the right of the King to have levied taxes on a conquered country, ſubject to him in right of his crown, was good, and the duty reaſonable, equitable and expedient, and according to the finding of the verdict paid in *Barbadoes*, and all the othe Leeward iſlands; yet by the inadvertency of the King's ſervants i the order in which the ſeveral inſtruments paſſed the office, (for th patent of the 20th of *July* 1764, for raiſing the impoſt ſtate ſhould have been firſt) the *order* is *inverted*, and the *laſt* we think *contrary* to and a *violation* of the *firſt*; and therefore *void*.

How proper ſoever the thing may be reſpecting the object of theſ letters patent, it can only now be done (to uſe the words of Si *Philip Yorke* and Sir *Clement Worge*) "by an *act* of *aſſembly* of th "*iſland*, or by the *parliament* of *Great Britain*."

The conſequence is JUDGMENT for the PLAINTIFF.

[*Note*. I have here again the pleaſure of returning my thanks t Mr. *Alleyne*, by whom I have been favoured with the copy of th ſpecial verdict in this remarkable cauſe. I have alſo uſed ſome materials largely with which I have been obliged in the firſt day's argument; the crowd being then ſo great that I was hindered in takin notes of my own; and for the ſame reaſon I have uſed the liberty i the judgment of ſupplying what I found imperfect or miſtaken i my own notes in ſeveral places, from a printed note of it which ha been publiſhed; and correcting that in ſome places where I found i miſtaken.]

Habeas Corpus.

Bliſſets Caſe.

ON a return to an *habeas corpus* iſſued at the ſuit of the father o the child.

Cauſe was ſhewn that the detainure of the child was at the deſire of herſelf who was about ſix years old, and with the mother who lived ſeparate from her huſband. At chambers before Mr. Juſtic *Aſton*—The father inſiſted upon the child's being delivered up t him or he would take her by force. The judge on this told him he would *commit* him. It appeared that the huſband was becom a bankrupt, and that the mother was forced to live ſeparate fro him on account of ill treatment: And that the child was likel to receive an improper education with her father, and was not wel uſed.

Lord *Mansfield*—The court, if the parties are agreed, will make n determination.

I

If the parties are *diſagreed*, the court will do what ſhall appear beſt for the child; fix on a boarding ſchool and the court will have no objection: Let the child in the mean time ſtay, ſo that the rule may be made with the concurrence of the family.

The *natural* right is with the *father*; but if the father is a *bankrupt*, if he contributed *nothing* for the *child* or family, and if he be improper, for ſuch conduct as was ſuggeſted at the Judge's chambers, the court will *not* think it *right* that the child ſhould be with him.

The power of aſſigning the cuſtody of a child brought before this court if the family diſagree about the cuſtody, and the child be not of years of determining for itſelf is diſcretionary; if the father appear on circumſtances improper to be permitted to take the child.

[It appeared to be held in a late remarkable cauſe of *Giffard* and *Giffard* before the Lord Chancellor, that the paternal authority as to its civil force was founded in nature, and the care preſumed which he would take for the education of the child; but if he would not provide for its ſupport, he abandoned his right to the cuſtody of the child's perſon, or if he would educate it in a manner forbidden by the laws of the ſtate, the *public* right of the community to ſuperintend the education of its members, and diſallow what for its own ſecurity and welfare it ſhould ſee good to diſallow, went beyond the right and authority of the father.* And this perhaps, is the meaning of that paſſage in the famous epiſtle of *Brutus* to *Cicero*. "*Sed dominum ne parentem quidem majores noſtri voluerunt eſſe.*"

That the power of a father over a child, however deſpotic the law allowed it to be in other reſpects as to the child itſelf, was yet ſubordinate to the power and conſtitution of the ſtate, ſo as not to juſtify any thing *contra rempublicam*.

Upon this conſtruction, I think, the argument drawn from this very paſſage to prove thoſe epiſtles not genuine will have little weight.]

Dow on Demiſe of Davy.

SECOND of *November* 1767, after ſeveral pecuniary legacies and real deviſes, the following reſiduary clauſe.

All the reſt and reſidue I give, deviſe and bequeath to my brother *W. B.* his heirs, executors and aſſigns, according to the nature of their reſpective eſtates.

Admittance in fee to a copyhold eſtate ſurrender, to the intents and purpoſes which he the ſaid *W. D.* ſhould by his laſt will and teſtament direct, limit and appoint. Admittance to a piece of waſte, which he ſurrenders in the ſame manner.

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* Nullum jus privatum juri publico poteſt derogare.

Codicil atteſted by three witneſſes.

Deviſe of annuity to Mrs. *C. D.* widow of his late brother, to commence from the legal day of payment after his deceaſe.

Houſe at *H.* and furniture. And I do ratify and confirm all the deviſes and bequeſts which I have made in my laſt will and teſtament, except what I have hereby altered; and I do direct that it may be *annexed* and taken as a codicil to my will. He had no copyhold lands at the making of the will, but had at the codicil.

Whether the copyholds paſs?

It was argued, that if theſe had been purchaſed antecedently, no doubt the reſiduary deviſe would have paſſed them.

9 *Mod.* 96. A copyhold will paſs under a deviſe of all the teſtators real eſtate.

Whether the codicil meant real and perſonal eſtate, ſo as to paſs theſe copyholds?

The execution of the codicil is a republication by reference, and operates as if he had made it a will of that date.

He confirms, and ratifies his former will in all reſpects not altered by the codicil, and he has not altered it with reſpect to the copyhold eſtates.

Caſes to prove this not a revocation—*Heeling* and *Heeling*— The teſtator expreſſes a legacy given to the poor of *Rexham.*

The caſe of *Potter* and *Potter* was cited.

Codicil not dated, but it appeared to be four or five days befor his death.

1 *Vez.* 438. and Sir *John Strange* quoted; this codicil amount to a republication; the codicil being indorſed, and the atteſtatio according to the ſtatute. No preciſe form is neceſſary: But whe he alters part and confirms the reſt, this ſhall be good as to what h appears not to have changed his intent.

So Lord *Northington* appears to have held.

I

In the caſe of *Jackſon* and *Hurlock*, in chancery there was a will. Marriage contended as a revocation. Codicil afterwards.

The Chancellor decreed the codicil was a republication, and would paſs after purchaſed lands.

The codicil here being made part of the will, the will is part of the codicil, and therefore ſufficient to eſtabliſh the relation.

The will is very ſhortly ſtated, only the reſiduary clauſe.

Lord *Mansfield*—Any thing particular in the ſurrender?

Nothing at all.

It was argued on the other hand, that the eſtate goes to the heir at law. If the deviſor had *no* copyhold eſtate at the time, and could have *none* in contemplation therefore by the will when it was made, he could have no intention to paſs any copyhold eſtate; after, he purchaſes and ſurrenders to ſuch uſes, intents and purpoſes as he *ſhall* limit and appoint, with a ratification of all deviſes and requeſts but what he ſhall alter.

It is contended that the eſtate paſſes in the codicil by reference to the will.

Your Lordſhip muſt be clear of the intent to paſs them, and the legal manner of performing it.

Is this intent clear? *Den* on the demiſe of *Harris* againſt *Cutler*. Surrender to ſuch uſes as he *ſhould* declare; determined that the lands will not paſs. And in the caſe of *Heeling* and *Heeling*, the words being "declared, and to be declared," your Lordſhip determined upon the word "declared" that the eſtate ſhould go according to the deviſe already made.

Not a word of that kind here; or any words in a will, by which it appears the teſtator had an intention to paſs copyhold lands.

The general deviſe of lands might have paſſed copyholds, with reference to the circumſtances of his eſtate at the time of making the will; but at the time in this caſe he had none to paſs.

As to the codicil, what is there that ſhows any deſign about deviſing the copyhold lands? He *alters* in ſome reſpects, and as to the reſt *ratifies* and *confirms*; then he leaves his will as to the reſt. He gives it no *new* effect, it ſtands as it did before; and can paſs no copyhold lands, becauſe they did not paſs then. And he has not expreſſed any intent that any thing ſhould paſs which could no when the will was made, but the contrary.

There is nothing, then, that takes from the heir at law.

Lord *Mansfield*—Did you look into the caſe of *Atcherley* and *Vernon?* 1 *P. W.* 703.

"I ratify and confirm my will, except in alterations." This was held a republication.

Lord *Mansfield*—This is a republication by the ſtatute. The codicil being ſubſcribed by three witneſſes that caſe is deciſive: And the will ſpoke by the republication as if it ſpoke at the *date* of the *codicil.* No doubt but the *copyhold lands will paſs.*

Mr. Juſtice *Aſton* cited *Cumm.* 383.

Superſedeas.

ON a motion to ſet aſide a writ of poſſeſſion, and *fieri facias* executed, pending a writ of error. The writ is no ſuperſedeas, unleſs bail be put in within four days.

Felony.

WHERE the party eſcapes into another county, and the goods are found, the juſtices of the county where the goods are found may commit in order to trial in the county where the goods were found.

Vide 24 *G.* 2. *c.* 55. And vide 13 *G.* 3. *c.* 31. *ſ.* 4.

Vide 2 & 3 *Ed.* 6. *c.* 24.

Lord *Mansfield* obſerved, if a capital offence is committed in the colonies, *Ireland*, or *Scotland*, the court will ſend them back, and not ſuffer them to be tried here. And his Lordſhip ſaid there was a caſe in *Strange*, meaning, I ſuppoſe, the caſe 1 *Str.* 646. *M.* 12 *G. Shelling* v. *Farmer* for ſeizing an houſe in the *Eaſt Indies*, which it was held, being *local*, could not be tried here.

Smith's Caſe.

Smith *v.* Dennis, *or* Denniſon.

ACTION for money had and received. Special verdict found at the aſſizes, ſtating that the defendant is poſt-maſter of the town of *Hungerford*, and that the plaintiff is a reſident in the ſaid town. And that in the ſaid town there has been a poſt-office for the conveyance of letters ever ſince and *long before* the ſtatute of Queen *Anne*. And that the reſidents in the ſaid town paid for the delivery of letters at their houſes a *penny*, over and above the rate of poſtage, for each letter ſo delivered. And that this had been paid by all the inhabitants of the town, except one family, who refuſed to pay, and, after five year's refuſal, had the letters delivered without payment of the ſaid additional penny. And the jury find that the ſaid penny, over and above the rate of poſtage, uſed not formerly to be paid, but the letters were delivered *gratis*. And that the ſaid demand of an additional penny was introduced on a change of poſt-maſters.

And that the plaintiff had a letter delivered at his houſe, and the additional penny, as aforeſaid, demanded by the defendant, over and above the rate of poſtage, which he refuſed to pay; whereupon the defendant refuſed to deliver the letter, until the plaintiff ſhould have paid the ſaid penny, which the ſaid plaintiff did afterwards, upon the defendant's ſaid demand. And that the ſame is the money for which the action is brought.

And the jury farther find, that the defendant *deſerved* the ſaid penny, as a *reaſonable* recompence for the delivery of the ſaid letter, unleſs he were bound to deliver the ſame to the plaintiff, ſo reſident in *Hungerford*, at his houſe within the ſaid town of *Hungerford*, *gratis*. But whether he were bound ſo as above by the plaintiff in his plea alledged they ſubmit to the court, and conclude in the uſual form.

The ſtatutes relative to the poſt-office were cited, which are principally 12 *Car.* 2. *c.* 35, *anno* 1660, the original act, but repealed by 9 *Anne*, *c.* 10, which is that ſtatute upon which the caſe principally turns, and 3 *G.* 1. *c.* 7. making the ſaid ſtatute of Queen *Anne* perpetual, and part of a general fund; and 4 *G.* 2. *c.* 33, which was relied upon greatly in this cauſe.

Objected againſt the demand, that *within* the town the poſt-maſter ought to deliver *gratis*; and there will be no objection reſulting from the extent of the town, for the larger it is the more letters will probably arrive, the revenue will encreaſe, and with it the profits of the poſt-maſter.

Argued for the plaintiff—This is a queſtion whether the poſt-maſter is bound to deliver letters to the inhabitants of a poſt-town reſident in the town, without any recompence.

This queſtion muſt be determined by a view of the acts of parliament relative to this ſubject taken together. §

Letters ought certainly not to be detained till the fee is paid.

The proviſions concerning the penny poſt-office illuſtrate the queſtion.

* 4 Bur. Hil. 8 G. 3. p. 2149. Poſtmaſter cannot detain a letter on demand of any thing for the delivery of the ſame beyond the act of parliament.

The poſt-maſter does what in *Barnes*'s caſe* it is expreſsly decided they cannot do. He was bound to deliver the letter according to the direction, and could not retain it, inſiſting upon a fee.

Lord *Mansfield* ſaid to the counſel on the other ſide what do you think of the judgment of the Common Pleas in *Browning* and *Goodchild*, upon the general queſtion? Surely it was deciſive. But if the parties are diſſatisfied I will not exclude them.

The poſt-town is the limit of delivery gratis.

The town or *place* is the word uſed; the town is taken as the place of delivery, where there is a town.

If the great caſe is right it is *deciſive*; for this was within the town.

And he *demands* it as a *duty*; which in *Barnes*'s caſe it was determined he could not do: *No man can demand a duty without an act of parliament*.

Mr. Juſtice *Aſton*—That within the poſt-town the poſt-maſter muſt deliver: For that otherwiſe there would be no limits; he might refuſe at the next houſe. The inconvenience would be great to all; and I cannot diſcover the reaſon.

Mr. Juſtice *Willes*—That the court hitherto had avoided determining upon the general queſtion: But that, now it came before them, he could not forbear ſaying there was no doubt upon that, and concurred with his brethren.

JUDGMENT for the PLAINTIFF.

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§ Quæ in pari materia fiunt conjunctim operantur.

Note, The caſe of *Browning* and *Goodchild* was in *Trinity* term, 13 G. 3.

Stock and *Harris* was alſo mentioned, which, it ſeems by Sir *James Burrow*'s note, was decided on the ſpecial uſage of the place rather than on the general rule, which appears to have been now firſt ſettled in this court, conformably to the opinion in the Common Pleas.

Harrington's Caſe.

THREE bonds upon a gaming contract, payable at different dates, with warrant of attorney to confeſs a judgment.

The obligee, to whom theſe bonds were given, put them into Mrs. *Harrington*'s hand, without notice of the illegal conſideration for which they were given, and without it's appearing ſhe was any way privy to the ſaid *illegal* contract. Whereupon ſhe ſwears, in her affidavit, that ſhe wrote to the defendant, the obligor, to know whether it was agreeable to him ſhe ſhould accept the ſaid bonds, and, receiving no anſwer, took out execution upon the ſame.

And now, a motion being made to ſet aſide judgment and execution, and that the bonds might be delivered to the defendant, as being void by the ſtatute of Queen *Anne*.

Securities upon a gaming contract coming into the hands of a third perſon, without privity, void, tho' for a bonâ fide debt.

Lord *Mansfield*—It is true this has been decided on the ground of a negociable bill.

It is *very ſevere:* And I don't know whether it does not more harm to an innocent perſon than good againſt gaming. But *ſo* it has been *decided:* And if you came in the formal way we would *not* alter.

But the court in ſuch a caſe will not relieve upon motion.

But when you come for a *favour*, we will *not* grant it againſt an *innocent* perſon; and if ſhe wrote that letter ſhe *is* innocent.

[Of games and penalties 12 *R.* 2. *c.* 6. *anno* 1388. 11 *H.* 4. *c.* 4. 17 E. 4. *c.* 3.

33 *H.* 8. *c.* 9. *anno* 1541. 2 & 3 *P.* & *M.* *c.* 9. 16 *Car.* 2. *c.* 7. 9 *Anne*, *c.* 14. 2 *G.* 2. *c.* 28. *ſ.* 9. 12 *G.* 2. *c.* 28. 13 G. 2. *c.* 19. *ſ.* 3. 18 *G.* 2. *c.* 34. 25 G. 2. *c.* 36. 30 *G.* *c.* 24. *ſ.* 14.]

Clarke *againſt* Johnſon and Co.

THIS was upon an action of *aſſumpſit* for money had and received, brought by the plaintiff, a brewer, to recover a ſum of money, againſt the defendant, keeper of a lottery office, upo the following caſe, which was ſettled before his Lordſhip at *Guildhall*, by counſel on both ſides, a verdict being found for the plaintiff, under his Lordſhip's directions, for 459 pounds four ſhilling and four pence.

CASE.

" *J. W.* being a clerk to the plaintiff, a brewer, and receiving " money from the plaintiff's cuſtomers to his uſe, and alſo negociable notes, in the ordinary courſe of the plaintiff's trade, for th " uſe of the plaintiff, paid ſeveral ſums, (aſcertained in the verdict) " and amounting in the whole to 459*l.* 4*s.* 4*d.* to the defendant upon chances of the coming up of tickets in the ſtate lottery of th year 1772, contrary to the act of parliament of the ſaid year. The plaintiff has given a releaſe to his clerk, and to the ſureties of th clerk, for the ſaid money, no part of which has come to the plaintiff's uſe, but the ſame is detained by the defendant, and not returned upon demand.

The queſtion is, 1ſt, Whether the plaintiff had a right to recover?

2dly, Whether the witneſs is admiſſible?

It was contended that, to juſtify againſt the plaintiff, in an action for money had and received, upon an implied contract to return, you muſt ſhew the money was the plaintiff's property, and that it came into the hands of the defendant by a good right; and that he has a better title to keep it than the plaintiff has to take it back.

12 *G.* 3.

Contract upon the chance of tickets coming up declared null and void.

That the defendant had it by no title.

He had it expreſsly againſt the law, which forbade to receive th money, and expreſsly puniſhed by penalty.

The defendant's claim can't well hold.

The plaintiff's claim againſt them is a fair and honeſt claim, and he has a right to hold.

As to the witneſs.

An objection to credit to be left to a jury.

The plaintiff's calling of him was neceſſary: And he had a right to call him, as bankers their clerks, to prove a miſtake in payment, though the clerk reſponſible.

Qui tam, informer againſt *Elliſon*.

As to the objection that this witneſs is not admiſſible, becauſe *particeps criminis*, in ſome caſes *participes criminis* are admiſſible.

A man may ſhew his own turpitude. *Tomkins* and *Barnett*.

Beſides, the defendants have performed their agreement; they inſured upon chances of coming up; the object of the inſurance is complete, and for ever done with.

Lord *Mansfield*—That caſe of *Tomkins* and *Barnett* has been a thouſand times denied.

Mr. *Buller*—A man inſures a ſhip, and, ſuppoſing it to be loſt, pays. The ſhip not loſt; he ſhall recover upon an *aſſumpſit*. But if a man give money to *bribe*, and the agent *bribes*, he ſhall not recover: For he gave it for an illegal purpoſe; he parted with it. *Volenti non fit injuria. Ex maleficio non oritur contractus.* If any caſe they ſhould have had *trover* upon *tort*; for there was no contract to ground an *aſſumpſit*.

Lord *Mansfield*—There was a caſe where the perſon who had taken the oath againſt bribery was called to prove the bribe.

This is an action to recover 459*l.* 4*s.* 4*d.* upon *aſſumpſit*. *J. W.* clerk to his maſter, received caſh and negociable bills to his maſter's uſe, and, without the knowledge of his maſter, laid them out in lottery tickets.

The act prohibits the thing, inflicts a penalty for the doing of it, and declares all acts to the contrary *null* and *void*.

The jury find a verdict ſubject to the opinion of the court whether *W.* was admiſſible.

He was releaſed both by his maſter and his ſureties.

But at large the general queſtion is, Whether the plaintiff can recover upon this evidence, or upon any in this caſe?

I know no rule that a man who ſays ſomething that is not proper of himſelf, is not to be heard where he goes to prove any material turpitude in another. The rule *non eſt audiendus* is, the jury will not credit him eaſily: There can be no ſtronger caſe than the man who had taken the oath againſt bribery admitted to ſwear the bribe he had ſworn againſt.

This is in the nature of *conditio indebiti*, where you come to recover what in conſcience ought not to be kept from you. It is an action in the nature of a bill in equity.

Nor is the rule of *particeps* as Mr. *Buller* ſtates it.

Two rules againſt fraud, one applied to protect innocent people; the other to prohibit thoſe who have acted on equal terms, mutually againſt a prohibition juris poſitivi, from proving an offence with which they are equally chargeable, and take benefit, againſt their own crime.

There are two ſorts of rules calculated to defeat fraud, one to protect good and innocent people, by reſcinding a fraudulent agreement, into which they are drawn; the other to prevent perſons dealing upon equal terms from falling into agreements prohibited, by preventing ſuch perſons from taking relief againſt ſuch contracts.

In the one caſe there is an indiſcretion; and as we don't apply the idea of abſtract abſolute goodneſs to caſes of this nature, which will not bear it, there is a fault. But you don't apply the rule of *particeps criminis non eſt audiendus*, but *in pari delicto potior eſt conditio defendentis*. The crimes are not equal. Shall the judges not enforce and execute the act? The act was meant to protect incautious people. The caſe of *Tomkins* and *Barnet*, to be ſure, is a precedent, I won't ſay that the argument is weak, but it is not very *ſtrong*; for it's ſaying that a perſon who avails himſelf of the neceſſities of a man to take 10,000 *l.* and the innocent perſon are in the ſame condition. And where it is not *par delictum*, the perſon comparatively innocent ſhall not, for his fault or indiſcretion, be made a ſcreen to cover the guilty, nor be deprived of redreſs.

The caſe of *Boſanquet* and *Daſhwood* is extremely ſtrong. Lord *Hardwicke* is reported to have declared that to ſay the crimes were equal would be to ſay that the cheator and cheated were the ſame.

In the caſe of a breach of a *poſitive* ſtatute, made for political reaſons, no body is drawn in to inſure. The ſhops are open; the offence equal: And at firſt it ſtruck me that the plaintiff came in the caſe of his ſervant; could not recover. But thinking of it that night and next morning I altered my opinion very greatly. And we have talked together upon it ſince.

But where it is paris gradus the defendant hath the better ſide. And in this caſe if the clerk had ſued for himſelf he could not have recovered.

Now whenever money, or any thing that can be aſcertained, paſſes without conſideration, the plaintiff, the true owner, comes in his own right, no matter whether it be paper or caſh, provided it be aſcertained. And in this caſe notes were more eaſily aſcertained than the bank-note the highwayman had put off at *Hatfield*, and the poſt-boy changed it.

Where the lawful property may be aſcertained the owner ſhall come and recover, tho' the thing has been unlawfully changed.

You remember the caſe of *Reynolds* and *Golightly*, where the money was traced through ſeveral hands. In all theſe caſes the original owner may come as plaintiff, and ſay, "You came improperly by "it; you have no right; you cannot retain it againſt me, who have "the right."

Vide ſupra.

I think this deciſion may be of great ſervice to the public. It may be ſomewhat difficult to *trace*, but wherever it *can* be *traced* it ſhall be *recovered*. In prohibited contracts, illegal contracts without conſideration, you take the money, if it be the money of the maſter, ſubject to his right to recover it when it ſhall be aſcertained. And I think this contract was *null*; the property always *continued*, and he ought to recover.

Whoever enters into an illegal contract takes the benefit of it, ſubject to all rights, known or unknown at the time, which are againſt the contract.

JUDGMENT ACCORDINGLY.

The King *againſt* Williams.

THIS cauſe came on firſt at *Guildhall*, at the ſittings for *London*, on the ninth of *July*, 1774, before Lord *Mansfield*.

Information againſt *John Williams*, publiſher of the *Morning-Poſt*.

Setting forth that he publiſhed a wicked and ſeditious libel in the *Morning-Poſt*, 15 ——, 1774: "Let the world know that Lady "—— (with the name at full length) is far gone with child by "her hopeful nephew."

Argued for the proſecution.

Mr. Serjeant *Glynn*—Though a libel may be one though it be *true*, yet, I think, it cannot be the more *innocent* and leſs malignant for being *falſe*. This ſeems ſo falſe, that I believe there is no a man in the kingdom who believes it, or thinks there is the leaſ ground to believe the ſuggeſtion.

Whenever I read a paper of this nature (for ſo malignant an one I never yet read) it always occurs to me, and I hope it will to you, that the author muſt be ſome enemy of the liberty of the preſs; For no man can read ſuch papers without doubting whether the preſs does not do more harm than good; and whoever gives cauſe to thoſe doubts is it's worſt enemy.

And if ſome means be not found for reſtraining the exceſs of ſuch privilege within the bounds of decency and juſtice, it's moſt zealous friends, as I ſaid, *muſt* begin to doubt whether it does not do *more harm* than *good:* And our property, with all our valuable connections, will be without protection. The caſe is before you, and I dare ſay you will think the proſecutor has done a duty highly incumbent on him. And if you believe this paper to be a libel, and the evidence which charges it, you will inflict that puniſhment by your verdict which juſtice requires.

Paper proved to have been bought at the ſhop of Mr. *Williams*, and the duty paid by Mr. *Williams*.

Lord *Mansfield* obſerved they had a right to read the whole if they pleaſed, becauſe it might explain.

It appeared in evidence the defendant received a yearly ſtipend of ſixty guineas, as publiſher of this paper, from the editors.

Counſel for the defendant Mr. *St. John*—I believe the noble Lord on the bench will ſupport me in ſaying that when the defendan calls witneſſes, to take off the preſumption which at firſt ariſes, th effect will be, if his teſtimony is credited, that the guilt imputed t him is removed by the taking away of this preſumption, which i ſome degree ſtands againſt every man charged with an offence.

In this caſe, as they were obliged to give ſome evidence in ſupport of the charge, they called a perſon who proves he bought th paper of Mr. *Williams*, which is a ground of preſumption to affec Mr. *Williams* as the publiſher till we prove the contrary.

If we prove Mr. *Williams* is not the author, is not the printer, i not the editor of this paper, is only the agent, and ſells them at hi ſhop, at the ſame price as the original editors; if a paper of thi ſor ſort has been left at his ſhop before he was up, and without his knowledge of the contents, and he, as ſoon as he comes down, on looking into the contents, expreſſes the greateſt concern and indignation that ſuch a libel had been ſold, ſends back all the papers in his ſhop unſold, not even lends one to a friend, but refuſes this, though particularly requeſted, you will clear him of the intention, and conſequently of the guilt and puniſhment.

The law as ſoon as the fact is fixed infers the guilt, and leaves the defendant to ſhake the preſumption off by evidence. In the caſe of murder, a man is killed, and found to have been killed by the defendant: The law will never preſume one man killed another innocently, in time of peace, and without legal authority from juſtice; but it puts him on his defence, and he may prove that he did it neceſſarily, for the protection of his own life; or that he did it *accidentally*, without malice or wilful negligence. And in either caſe he will be acquitted.

So far from malice to any character aſperſed in this paper, he ſhews a juſt and honourable reſentment at the malice of another; ſo far from negligence, from the moment he knows the contents, and on the very morning the papers came to him, he does every thing in his power to ſuppreſs the publication.

Mr. Serjeant *Glynn*, in reply—Gentlemen of the jury, that Mr. *Williams* is not the printer, Mr. *Williams* is not the proprietor, may be facts, certainly true and conſiſtent with the charge before you. It is not a queſtion whether the evidence is inſufficient to prove him a publiſher; or whether there has been ſufficient to repel the preſumption at firſt ariſing. As the *publiſher* he ſtands *forth*; as the publiſher only he is charged. They are ſold at *Williams*'s; they are alſo ſold at two coffee-houſes; and alſo at the editor's.

For ſixty guineas annuity Mr. *Williams*, then, is content to take the chance of publiſhing what was given him to publiſh.

The author is mentioned—who is the author? The printer—who is the printer? Who, then, brings all this miſchief to light? *J. Williams* alone. The miſchief, however, is not extenſive: If ſome have got abroad the defendant cannot help it. They are all ſold early in the morning:* This I believe. And this order of not publiſhing might have been repeated by *Williams* at nine in the morning without harm to the ſale daily. And indeed if in this inſtance any part of the ſale was ſtopped, Mr. *Williams* ſuffers nothing by the ſale ſtopped, for he has a *certain* ſtipend. The proprietors are no ſufferers, for they have ſold a ſufficient quantity. The miſchief is not ſtopped, for the publication is complete in the morning, and no body who thinks but is apt to believe, when he has *once* read ſuch a

* Five o'clock in the morning they ſupply the coffee-houſes, as a witneſs for the defendant ſaid.

paper, that he has read it *once too much*. A paper of ſuch a ſort is ſeldom looked into a *ſecond time*, any more than a ſecond day.

This is, therefore, juſt the caſe of the common publication of a libel.

Lord *Mansfield*—Gentlemen of the jury, this is an information againſt the defendant for publiſhing a libel, ſet out by the information.

That it was *publiſhed* is not diſputed; that it was a very *grievous* and *infamous* libel is not diſputed.

That the meaning is clear is not diſputed.

But it is ſaid the publiſher did not know what it was, and ſtopped it when he did. This is ſet up as a *juſtification* if any thing; for nothing in *mitigation* comes before you; *that* ariſes in *judgment*.

There are a thouſand things might have been a juſtification, but this is not one of them.

Williams is the *oſtenſible* publiſher; the *author* does not appear; the *printer* does not appear. At five in the morning it's *publiſhed*; at nine Mr. *Williams* comes down; he did not read it: I dare ſay they never read a thouſandth part of what they publiſh. Are they, therefore, to juſtify their publications, be they what they will, becauſe they publiſh they know not what?

If his ſorrow was honeſt and ſincere it may go very far in *mitigation*. There is no *certain* puniſhment affixed; it depends upon the circumſtances and malice of the criminal; but it can be no legal juſtification. If you are ſatisfied with the evidence that he was the *publiſher* you will find him guilty; if otherwiſe you will acquit him.

Jury, without going out, found the defendant guilty.

And now, in this preſent term, 22d of *September*, 1774, judgment of the court was prayed.

In mitigation it was offered by his counſel, that he is not publiſher, but takes a ſtated ſalary of 60*l*. that he always uſed to inſpect the papers at five in the morning, but was, unfortunately, later that morning. That on reading he diſcovered and was much hurt with the contents; that he immediately forbade the ſale, and refuſed to let any body ſee it. That he deteſts the publication; that he knew not till nine on that morning of publication that there wa ſuch an one in that or any other paper in the world. That he delivers it out, and is not the only publiſher, for that they are delivered at the printer's.

On the other ſide—That he took the ſalary from the publiſhers; that he muſt take it ſubject to all the riſque and all the conſequences: And that inſpection came too late for an excuſe, when he had let the papers go out of his ſhop. That if he was unfortunately ſo late upon that particular morning he would have an opportunity now of profiting by the judgment of the court, and either lie in bed quietly, without being concerned as an agent for news-papers, or elſe take care at leaſt to publiſh nothing for the future without reflecting, that if he choſe to ſuffer a publication to be made through his hands, he muſt ſee that it was innocent, or abide the event of it's being otherwiſe at his peril.

Mr. Juſtice *Aſton* delivered the judgment of the court. You ſtand convicted of a ſcandalous libel, charging a gentleman and lady with a very atrocious crime; without ground, and, as you acknowledge in your own belief, unjuſtly.

I am not at all clearly ſatisfied that a number of people, with a doctor of divinity at the head of them, are authorized to publiſh ſuch writings, by hiring a perſon to ſtand out for them.

The liberty of the preſs is a very great advantage and ſecurity to our *public liberty*: But it is frequently abuſed to the purpoſe of the moſt injurious attacks upon private liberty and tranquillity.

It is not ſufficient that a man riſes later than his uſual time, ſees a pernicious publication has gone out of his ſhop by the hand of his ſervants, acting in the courſe of ſale under his authority, and then endeavours to ſtop the reſt. However, though it does not *juſtify*, yet, as it appears you were ſorry when you found it was publiſhed, and ordered no more ſhould be ſold, and refuſed to ſuffer it to be read, on this conſideration the court *mitigates* the fine. But, in order to *example*, and to reſtrain ſuch *licentious* attacks upon characters, and to prevent the *general* miſchief, the judgment of the court is, that you pay a FINE of 100*l.* and be *impriſoned* for ONE CALENDAR MONTH, and until the ſaid fine be paid.

Goodright, on Demiſe of Carter, *v.* Straphan and others.

THIS was before his Lordſhip at the ſittings after *Trinity* term laſt at *Guildhall*, and now came before this court on a motion for a new trial, which the court took time to conſider upon ſuggeſtion of the counſel who attended.

Ejectment as widow of one *Carter*, title from one *Roberts*, 1710. Plaintiff had been in poſſeſſion: To prevent bar from length of time they offered evidence of a variety of acts to prove that the poſſeſſion of the plaintiff was a ſpecial qualified poſſeſſion, as receiver unde the defendant's title.

On the other ſide—That by indenture between *Carter* and hi wife on the one part, and *Greeney* on the other, reciting that *E. Carter*, from and after the deceaſe of *Mary Trevor*, widow and relict of *Roberts*, was, under the will of *Roberts*, entitled to a meſſuage on *Thames* wharf, in the city of *London*, and alſo to three meſſuages in *Reading*, and truly indebted to *Greeney* in a ſum. And *Greeney* had farther agreed to ſupply 144 *l.* for the ſupport, ſubſiſtence, ſupply, and maintenance of them and their family ſo long as *Mary Trevor* ſhould live. They grant for a term of ninety-nine years the houſe and premiſſes at *Reading* to *Greeney*, his heirs and aſſigns. Covenant by the huſband that he will pay the ſums mentioned, principal and intereſt, and that until ſuch payment it ſhall and may be lawful to and for the ſaid *W. Greeney*, his heirs and aſſigns, to have, hold, and enjoy, and to receive the rents and profits thereof, for the term of ninety-nine years after the death of *Mary Trevor*.

After the death of the huſband Mrs. *Carter* gives a receipt.

"24th of *June*, 1760, from 1755, caſh received from *H.* and
" *T.* eſtates, deducting taxes and repairs—125 *l.* from the *Reading*—
" due to me, 79 *l.*"

She afterwards gives an order to her tenant to attorn to *Saunders* and *S.* executors of *Greeney*, the mortgagee of the premiſſes, who had not before poſſeſſion of the houſes in *Reading*; and to pay rent.

She ſurrenders poſſeſſion of an houſe to the executor of *Greeney* by indenture, and ſhe calls him mortgagee thereof.

Lord *Mansfield*—This was contended as very ſatisfactory evidence of an acceptance of *Greeney* as tenant during the term.

On the conſcience and right of the caſe it ſtruck me very ſtrongly. To be ſure *no woman* can join with her huſband in a *deed* without a *fine*; but no man who can perſuade his wife to join in a deed, would not perſuade her to join in a *fine*, therefore it is mere form, and the defect of form ſhe may ſupply by her acquieſcence and actual acceptance when in her own power.*

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* Licet diſpoſitio de intereſſe futuro plerumque ſit inutilis, tamen fieri poteſt Declaratio præcedens quæ ſortiatur effectum interveniente novo actu.

The money borrowed and lent for the ſupport ſupply and maintenance of them and their family; and lent with a very kind intention.

I thought it very much againſt conſcience that ſhe ſhould take the benefit and avoid the charge.

I am extremely glad it has been moved. I think it very candid the counſel ſhould adviſe a motion upon the verdict, rather than a new ejectment.

When this came firſt before me, Mr. *Wallace* argued upon the authority of leaſes whether with or without rent, that by action of waſte in one caſe, and acceptance of rent in the other, ſhe may confirm a leaſe which ſhe might have diſallowed?

It is ſaid that theſe caſes are exceptions to the general rule, which ſays, that the deeds of a woman are not *voidable* but *void*; and that thus, though a great many years ago, the court would have ſaid they could look no farther, they ſhould now ſee the *ſubſtance*, it is not a leaſe but a *mortgage*. It was for the advantage of *agriculture*, and benefit of tenants, that the leaſes were allowed. This diſtinction we think *true:* That the woman ſhould only ſet aſide leaſes when diſadvantageous to her; and that we are to look with the ſame eyes upon this as other caſes, and ſee into the *ſubſtantial* * nature.

Vide the caſe of Tracey Atkins, in Sir James Burrow.

What then is this caſe in ſubſtance and real juſtice? And what is it with reference to law and authorities?

Perk. 154. "If a femme deliver to me a deed as her deed it is "*void*, and if her *huſband* afterwards *die* and *ſhe deliver* the ſame "deed, then it is *good*."

Are then the acts here amounting to a delivery? I think we have authority they are: *Co Litt.* that a deed may be delivered by *words* without *actual delivery.**

Comment on B. 1. ſec. 41. p.36.^{a} and vide the caſe ſupra where this was determined.

Roll's Abr. If a femme covert execute a deed with her huſband, and after the death of her huſband ſhe delivers this deed, it is good.

What then is the caſe?

The defendant is in poſſeſſion of the mortgage, ſhe declares her ſurrender, ſhe accounts to him as mortgage; the act with reſpect to the poſſeſſion of the houſe at *Reading*, is a *confirmation* of the deed as to that; and a confirmation of part, is a confirmation of the whole. We think therefore, there are grounds enough upon this caſe to ſay, that the deed is *ratified* and confirmed by the wife after the death of the huſband; not upon the diſtinction of leaſes, but upon the delivery of the deed.

Taylor *againſt* Fiſher and Others.

LORD *Mansfield* reported the caſe.—Ejectment of an undivided moiety claimed under the will of one *Perkins*, he gives to each of his two daughters the undivided moiety—to them and their children of their bodies begotten or lawfully to be begotten; and if either ſold her ſhare, the other was to have the moiety, nothing turns upon that; after this there was a deed of partition 1705, by which *F. T.* agreed to hold during the life of *M. T.* and *E. S.* *M. T.* died ſome years before *E. S.* and he in 1734. *F. T.* held over, under whom the plaintiff now claimed as being entitled from the length of time to preſume an actual ouſter.

From 1734, this eſtate had been held ſolely without any claim by *M. T.* or any claiming under her.

In 12 or 14 the eſtate at *Tottenham* came into other hands. I left it to the jury that they might preſume *actual ouſter* upon the circumſtances.

Argued for the plaintiff—Theſe parties were tenants in common without an eſtate, the others were joint-tenants. And upon forty years poſſeſſion the jury did right to preſume an actual ouſter. There is no need to ſtate caſes of preſumption from length of time ſurrender on a leaſe; livery and ſeiſin.

In this caſe of tenancy in common poſſeſſion is no *bar* for the limitation to run upon without *actual ouſter*; but it is good to leave to a jury as *preſumptive* evidence.

Epſom againſt *Shackleton*, *Yorkſhire* aſſizes.

It was contended there, that being an eſtate where the defendant was entitled to the whole, the evidence of an adverſe poſſeſſion by receipt of rents and profits of a moiety was not ſufficient, when the father had been admitted and his anceſter to another moiety. And Mr. Juſtice *Blackſtone* ſaid, that the ſtatute of Queen *Anne*, in caſe of freehold, was a material circumſtance in the caſe, and length time a poſſeſſion for forty years. I am perſuaded the court will be of opinion, preſumption of ouſter was well warranted in this caſe.

Will made 1690, agreement 1705, to take during the life of *H.* Surrender about thirty-four.

That there was no perception of profits during forty years.

Tenants in common are as if ſeized of ſeveral eſtates as to this conſideration.

It is argued that the one of two daughters held poſſeſſion fifty years, and contended that the daughters were tenants in common, and therefore the poſſeſſion of *one* is the poſſeſſion of the *other*; but this does not hold againſt the ſtatute of limitations.

Lord *Holt* ſays, forty years receiving rent, with no demand, ſeems very ſtrong.

Mr. *Dunning* on the other ſide—There is no diſtinction I think can be made, to take this out of the general rule. I think the poſſeſſion of one tenant in common is the poſſeſſion of the other.

The party in queſtion being under age and a minor, ſhe could not in 1715 do any act to the prejudice of the eſtate.

The law does not ſay the poſſeſſion of one ſhall be that of the other for a limited time, but to the end of the world if neceſſary.

There is here no adverſe poſſeſſion from 29 at leaſt, if not 21.

How can a *copyhold* differ from a *freehold?* The copyholder admitted only to a moiety, this proves his title. The defendant was only entitled to a moiety, which in the year 1734 is ſhewn to have been in him, and the other moiety in my client.

An *unlawful* and *tortious* act as in this caſe of one tenant againſt another, cannot be preſumed forty years after his death.

If your Lordſhip be ſtill of opinion, the jury, who exerciſed no judgment, did right in finding by preſumption an actual ouſter, and that it *can* be preſumed, and that there were circumſtances to preſume it, then the finding is right. But, with all poſſible deference, I muſt ſay the jury were miſdirected.

This is my opinion; and if your Lordſhip upon conſideration ſhould be of that opinion, I ſhould pay your Lordſhip a very il compliment, in ſuppoſing you would not be as ready to decide on that ſide as on the contrary.

Reeding and *Royley Salk.* 423. Limitation never runs againſt a man but where he is *actually ouſted* or *diſſeized*; and therefore a tenant in common may diſſeiſe a man; it muſt be actual ouſter and not perception of profits.

Actual ouſter does not mean putting out by force of hand proved in evidence; but holding over by ſuch poſſeſſion as muſt have been adverſe to the tenancy, is full preſumptive evidence of actual ouſter.

Lord *Mansfield*—It is moſt certainly true, that I told the jury they were warranted to preſume an adverſe poſſeſſion and ouſter of the other tenant in common. Some ambiguity ariſes from the term of *actual ouſter*, as if *puſhing* him by the ſhoulder was *neceſſary*.

The ſingle act of holding over a length of time can give him no title; but tenant *pur auter vie* holding for twenty years after the death of *ceſtuy que vie*, is a bar. Tenant in common holding *eo nomine* can never bar, becauſe he holds only in ſupport of his right. If he acknowledges the other party as tenant, and ſays he will pay him the money, there is no *adverſe* poſſeſſion; nor is ſaying he will not pay him at the time without *denying* the *title:* But where he denies the title and keeps poſſeſſion againſt it, there is an adverſe poſſeſſion and ouſter. Has he held in this caſe by adverſe poſſeſſion? The poſſeſſion has run numberleſs years.

I continue of the ſame opinion as I was at the trial.

That the forty years poſſeſſion on the circumſtances of this caſe was a bar.

Mr. Juſtice *Aſton*—There have been various opinions what ſhall be an *actual ouſter*; and what poſſeſſion ſhall be the poſſeſſion of one tenant in common for another: I think it is while he takes the profits as tenant in common. The difficulty ariſes from there being a time in which there certainly was a tenancy in common. What is the bar? A forty years poſſeſſion; and very rightly, for otherwiſe nothing would be a bar.

This is not a bare preſumption, I think, but an actual *bar*.

I think that the evidence is proper to be left to a jury; and there is not a tittle of evidence to find a tenancy in common for forty years back.

Mr. Juſtice *Willes*—This caſe muſt be determined upon its own circumſtances. If there was a right it was at the time of the death of *T. S.* and if for thirty-ſix years there has been no claim, how dangerous, after ſo long quiet enjoyment, to receive a claim.

Whatever the old ideas might be of an *actual ouſter*, I think adverſe poſſeſſion is *now actual ouſter*. And the idea not to be extended ſince the ſtatute of Queen *Anne*, which has changed the remedy, and does not require actual entry to give remedy.

Force of the ſtatute of Queen Anne as to what ſhall be actual.

I take adverſe poſſeſſion for thirty-ſix years without actual ouſter, in the ſtrict antient ſenſe of an *agreement* which diſſolved the tenancy in common.

Thirty-ſix years poſſeſſion, evidence of agreement diſſolving the tenancy.

Mr. Juſtice *Aſhhurſt*—Here is a poſſeſſion of forty years without any rent or profits taken, I think that this was good ground for a jury to *preſume* any thing to *deſtroy* the defendant's title. They might either preſume an actual ouſter, or, if neceſſary, a conveyance. In the *Yorkſhire* caſe, it is not neceſſary for me to ſpeak what would have been my opinion. It did not come properly before the court. It was whether the plaintiff was barred by the ſtatute of limitations. The court were not to preſume, the *jury were* to *preſume*. And I think they did very right in this caſe, to preſume every thing which might deſtroy the plaintiff's title.

That ſuch poſſeſſion was ground of any preſumption againſt the defendant's title.

Witneſſes.

IF you come to enlarge trial for want of witneſſes on your ſide, you ſhould be ready to admit all neceſſary facts, which are of a nature to be proved without witneſſes on theirs.

You muſt ſhew clearly the want of material witneſſes has not been contrived and thought of, as an argument to put off the trial. If they might have applied *earlier*, or there be any apprehenſion the objection has ariſen juſt time enough to avoid the trial, it will be refuſed. And ſo, wherever this want of evidence might have been diſcovered, and application made for the relief of it originally, and this has not been done, it may expect from the practice and juſtice of the court to be refuſed.

Jones *againſt* Cowper.

GOODS ſold in conſideration that *A.* by parol promiſed *B.* the vendor, that if *C.* the vendee did not pay for the goods he would pay them. The goods are delivered by *B.* to *C.* accordingly, and *B.* ſues *A.* for the money.

Contended that this not being a promiſe in writing, was by the ſtatute 29 *Car.* 2. not binding, for that the ſaid ſtatute *c.* 3. *ſec.* 4. in the ſecond clauſe ſays—that no action ſhall be brought to charge any defendant upon any ſpecial promiſe, to anſwer for the *debt* of another, unleſs the agreement upon which the ſaid action is brought, or ſome memorandum or note thereof ſhall be in writing.

To this it was anſwered, that the ſtatute meant where the promiſe to be anſwerable for the debt of another, was not the *original* promiſe upon which *credit* was given; but that here the original credit was given to the defendant, who, *before* the goods were ſold promiſed to pay on failure of payment of the vendee, upon the *credit* of which promiſe of the defendant's the goods were ſold; and therefore that this action was well brought.

Caſe, *Hil.* 1773, at the ſittings of *niſi prius* K. B. *Mawbridge* and *Cunningham*, where the goods were delivered in conſequence of a promiſe made to be anſwerable for another; this promiſe was held to bind the defendant in law.

Mr. *Dunning*—There the party undertaking was *alone* liable originally, and not the party to whom the goods were delivered.

But here, laying the ſtatute of frauds out of the caſe, you ſhould have proved, that you had *firſt* applied to the vendee and could not get your money of him; for he was *firſt* liable. I do not know what *can* be a *collateral* or *conditional* engagement if this be not; and you have not ſhewn that the condition was become abſolute in your favour by default of payment from the *original* debtor the *vendee.*

Lord *Mansfield*—There is a *clear* diſtinction between an undertaking for another, *before* a debt contracted and a promiſe *afterwards.*

Undertaking *before* delivery, "you may truſt to me or I will ſee "you paid;" there the party who undertakes becomes the debtor.

But where the undertaking is before the goods are delivered *in caſe he does not pay I will pay you,* there is a *nicety*; and I would not decide without looking into the caſes. But what Mr. *Dunning* ſays is *deciſive,* as to the caſe now before the court.

The promiſe is *conditional,* and they have not ſhewn they uſed due diligence to have the debt from the perſon *firſt* liable.

Gilbert

Gilbert *againſt* Berkinſhaw.

ACTION againſt the defendant for *maliciouſly* indicting the plaintiff for perjury.

Second and third count for defaming the plaintiff, and ſaying of him—he is a ſcoundrel and I will prove it.

It was left to the jury that if there appeared a *probable* cauſe, the action would not lie.

The plaintiff was an attorney.

The jury found for the plaintiff (who had laid his damages at 5000*l.*) 400*l.* The plaintiff took the verdict upon the ſecond and third count.

A new trial was moved upon the ground that the damages were exceſſive.

And alſo that the verdict was againſt evidence, and againſt the directions of the judge, for that there was a *probable* cauſe.

The judge on the report of the caſe ſaid, he thought there was evidence of the malice, becauſe the defendant ſaid "I will attack "him again."

Argued againſt the rule—that the court will not ſet aſide a verdict becauſe of exceſſive damages. Where they have ſet aſide a verdict in which the damages may have appeared exceſſive, it has been for mal-practices, and not for the largeneſs of damages fairly obtained.

Stiles 166. where 1500*l.* was given.

1 *Lev.* 9. That the ground of the deciſion in *Stiles* was not the largeneſs of the damages, but *ill* management with the witneſſes.

The court cannot *meaſure* the *ground* on which the jury find damages that may be thought large; they may find upon facts within their *own* knowledge: And in order to enable them to this, it was that the old common law writ appointed them to be *de vicenet'*

Twelve jurors are not to be ſuppoſed to give a verdict contrary to their conſcience; and both parties put themſelves upon the jury to abide their deciſion, as to the quantity of the damages, as well as whether any or not.

The

A man's reputation is hurt, and that very eaſily, be it ever ſo ſound; his character in his profeſſion, which concerns him highly, both with regard to his good name and comfort, and to his means of ſubſiſtence, is injured—no man can ſay how far: Nor can any man eſtimate the ſenſibility of the perſon injured, and reduce the compenſation to a ſtrict ſum, not to be exceeded, in pounds, ſhillings and pence, let twelve honeſt men think of it as they may.

Second—Whether this were a *malicious* proſecution without foundation, the jury were *competent* judges, and have found that it *was*; and malice needs not be *expreſſed* but may be *implied* from circumſtances. The declaration after verdict that he would attack him *again* ſeems evidence of malice, and of a deſign to ruin him in his profeſſion.

Wilford and *Berkeley*, the damages were extremely high; but the court would not interfere.

The perſon who brought this indictment to trial had heard all the evidence againſt the plaintiff upon a former cauſe; in which the plaintiff in this cauſe was defendant, and *knew* that it was ſo inſufficient as to end in a nonſuit, and yet has haraſſed the plaintiff with an indictment.

Shall there be a *right without* a *remedy?* Shall the party who comes here for a new trial have purſued *malevolently* and in an *illegal* manner, and not ſatisfy in the manner which the law requires in damages?

To ſend it down to a new trial will reprobate, in the circumſtances of this caſe, the deciſion of the jury, and will be telling whatever jury ſhall try it again, that the plaintiff's reputation is not worth any damages in the leaſt conſiderable; or it may be thought to ſignify to them, that they ſhould find no damages at all.

On the other ſide—That the jury will not take it as a reflection upon their verdict ſince they had evidence, which if they could have read it upon the trial, might have made it unneceſſary to come for a new trial.

That with a proper aſſignment the indictment might have been ſupported; and that it had never been decided upon the merits.

That as to damages for the injury done the plaintiff in his *profeſſion* theſe were out of the action; for the declaration ſtated no *ſpecial* damages, and if the jury took any into conſideration they went out of the action, and did that which would vitiate their verdict, and make it *void* throughout.

The jury therefore, it is ſubmitted, were *miſtaken*; the damages *much too great*; and the verdict *ill founded*: And therefore that a *new trial* ought to be granted.

If want of inſtructions to counſel is objected, it was the defendant's choice, who thought it the right of an *Engliſhman* to plead his own cauſe. And what counſel could have induced the court or jury to form a different opinion upon the caſe, than that which the jury formed, and which the judge who tried reports they had ground to form?

In reply to this Mr. *Lad* ſaid—that the defendant had relied upon his innocence, and therefore choſe to ſpeak for himſelf; that as to the indictment of perjury there had been an acquittal by *miſtake*, but no trial upon the merits.

Mr. Juſtice *Willes*—I would not interrupt Mr. *Lad* while he was ſpeaking, but I think I am called upon perſonally: I tried the cauſe; and the acquittal was *certainly* upon the *merits*.

The perjury aſſigned turned out to be a mere *ſurprize*. In examination, he immediately *recollected* and *corrected* himſelf conſiſtently with his former evidence; his behaviour was thought to be extremely *candid*, and *acknowledged* as ſuch. And the counſel on the other ſide, upon this evidence, and other witneſſes concurring with it, not having any thing to oppoſe, his client was *nonſuited*.

Upon the indictment for perjury, five of the witneſſes called ſaid they did not hear him correct himſelf, others ſaid they did. I directed the jury upon the general appearance of the queſtion, that it appeared the now plaintiff had given his evidence *fairly*: I did *not* direct the jury to find him *perjured*.

I told them, the parties, they were gentlemen of the ſame profeſſion, and wiſhed the matter was dropt, and hoped to think *both miſtaken*.

I thought he would carry no great damages, by carrying his cauſe down to trial.

Lord *Mansfield*—This rule to ſhew cauſe why there ſhould not be a *new trial*, comes before the court ſingly on the judges *report*.

Not on the ground of *ſurprize*, material evidence *ſince* diſcovered, or *miſtake* in the jury.

Verdict taken upon two counts, one of which is, for ſaying o the plaintiff, "He is a ſcoundrel, and I will *prove* it;" the othe count alſo charges words of defamation.

The only ground is of *exceſſive* damages: And though I woul be *very ſorry* to lay down a *rule* that *no* new trial would *ever* b granted on account of *exceſſive* damages, where they might be ſ *enormous* that it would appear their minds muſt have been *unjuſtl* and *unreaſonably* heated, or otherwiſe under a *corrupt* influence, o have taken in ſomething by miſtake to the damages which by la they could not; yet I do not think it fit that this court ſhall ſay, i a matter of uncertain damages, there ſhall be a *new* trial, becauſe i the court had been to fix the damages they might have given *leſ* or a jury *might* have given leſs.

The court will not judge by a *meaſuring caſt*, where matters, properly for all parties, have been left to the *ſound diſcretion* of a jury in a ſubject of which they are *competent* and *proper* judges.

It is enough that it may be ſupported upon the *general circumſtances*, (and there are no *ſpecial* damages aſſigned) the nature of the injury, the *feeling* which the plaintiff may have of it, the degree o evidence of malice, are all circumſtances properly left to a jury.

I remember, ſince I ſat here, an action by a very poor man, fo a charge of criminal converſation with the plaintiff's wife. O a motion for a new trial, on account of *exceſſive* damages, *new tri* was *refuſed*.‡ And ſo in the caſe of a very poor ſervant of S ———'s, who had received from his maſter 150 laſhes, an there was evidence that he had ſaid that for a very *trifling* ſum h would receive them *again*. The jury found the plaintiff 100*l* damages. They *reſented* the *behaviour* of his *maſter*; they exerciſe their *judgment* accordingly; and the court would not grant a ne trial.

This is not the caſe of the *greyhound*,* of the value of which t court could form an eſtimate, and ſay they have found forty tim too much. And it was upon *evidence*, and the judge not diſſati fied.

Mr. Juſtice *Aſton*—That he thought the caſe of the greyhoun went upon this, that they had thrown in aſſault and battery, an

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‡ Alluding, I believe, to *Berkeley* and *Wilford*, above quoted, where the ju gave 500*l*. damages. The defendant had a place of 50*l*. a year, as clerk of t Exchequer, during pleaſure, which was his *whole* ſubſiſtence.

* *Seale* and *Hunter*, about two years before, where the jury found eighty poun damages.

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other matters which the plaintiff had not laid in his declaration, and of which they ſhould not have received evidence.

That damages might, indeed, be ſo evidently exceſſive as to be ſet aſide: But that the court had frequently refuſed it where there was no ground of *miſtake* or *unreaſonableneſs*.

The damages *here* are *ſaid* to be exceſſive; I don't *know* they are. In truth who will *prove* it. He ſays, that the plaintiff is a ſcoundrel, and he will prove it, and this of a man in a profeſſion—an attorney, and in that *public* manner, and after verdict.

RULE DISCHARGED.

Curia Cancellaria.

Before Lord Chancellor Apſley, *aſſiſted by Mr. Juſtice* Blackſtone.

ON a bill praying an injunction againſt an edition by Mr. *Newbery* of an abridgment of Dr. *Hawkeſworth*'s Voyages.

The Lord Chancellor was of opinion that this abridgment of the work was not any violation of the author's property whereon to ground an injunction.

That to conſtitute a *true* and *proper abridgment* of a work the *whole* muſt be preſerved in it's *ſenſe:* And then the act of abridgment is an act of underſtanding, employed in carrying a large work into a ſmaller compaſs, and rendering it leſs expenſive, and more convenient both to the *time* and *uſe* of the reader. Which made an abridgment in the nature of a *new* and a *meritorious* work.

That this had been done by Mr. *Newbery*, whoſe edition might be read in a fourth part of the time, and all the ſubſtance preſerved, and conveyed in language as good or better than in the original, and in a more agreeable and uſeful manner. That he had conſulted Mr. Juſtice *Blackſtone*, whoſe knowledge and ſkill in his profeſſion was univerſally known, and who as an author himſelf had done honour to his country.

That they had ſpent ſome hours together, and were agreed that an abridgment, where the underſtanding is employed in retrenching unneceſſary and unintereſting circumſtances, which rather deaden the narration, is not an act of plagiariſm upon the original work, nor againſt any property of the author in it, but an allowable and meritorious work. And that this abridgment of Mr. *Newbery*'s falls within theſe reaſons and deſcriptions.

Therefore the bill praying an injunction ought to be diſmiſſed.

BILL DISMISSED.

The King *againſt* Woodfall.

THIS cauſe came on at *Guildhall* 11th of *July*, 1774, before Lord *Mansfield*, at the ſittings for *London*, in the King's Bench.

It was an indictment for a libel on the revolution, and on the perſons of King *William* and Queen *Mary*.

That it is not a libel barely to reflect on government, if it be done in ſuch a manner as is not likely to excite ſedition.

It was argued by Mr. *Hardinge* for the defendant, to this effect— I never yet heard that *barely* to *attack* the government is a *ſcandalous* and *ſeditious* libel.

I can't ſeparate from the idea of a *ſeditious* libel the tendency to *excite ſedition*. I may be on very ſlippery ground, being not ſo verſed in the niceties of law as to be able to pronounce poſitively; but I take it there is no certain definition, from the nature of the thing, what ſhall be a libel: That will be ſo at ſome times which is not at others. But that in general a libel muſt be calculated to excite ſedition.

Juſt at the time of the revolution it might have had this effect, when men's eyes were not ſufficiently opened; it can now have no other than to make the readers laugh at the abſurdity of it, or pity the weakneſs.

An author of note ſays it is a very groſs miſtake to ſay the King is the third eſtate; biſhops are the third eſtate, and the King is ſupreme over all.

However *improper*, this is ſo *nonſenſical* a diviſion that it can never excite ſedition. And of what is ſaid here the ſame may ſafely be affirmed.

As to perſonal reflections upon *William* the third, it is conceivable he might have been a very bad man, and yet the revolution a very excellent and neceſſary work. Sir *John Dalrymple* has not been arraigned, and yet nothing can be more injurious to the character of *William*. Throughout he gives him two ſuppoſed reaſons for every thing he does, and conſtantly aſſigns the worſt as the true.

As to the reflections upon the revolution, they are introduced by an *if*. *If* ſuch things be a curſe the revolution is a curſe. The connection being thus, if the things did not exiſt then the revolution is not a curſe, if they are neceſſary and beneficial then the revolution is a bleſſing.

Reflections upon King *William* can be no reflection upon his preſent Majeſty.

A work has been publiſhed of the higheſt merit, and by an author than whom no body, I believe, has a greater reſpect for the conſtitution.

It is the beſt work that ever has been publiſhed upon the laws and conſtitution; a moſt elegant, accurate, and ſyſtematical work; yet he conſiders the revolution on very confined principles, but without blame.

An author of very great merit, and attachment to the government, has ſaid a thing *more* injurious to the revolution, where he calls it a precedent in point of fact; yet this author is not puniſhed or cenſured.

However I may ſucceed upon the other grounds, there is *one*, I am perſuaded, I ſhall ſucceed in at all events.

That the things and perſons intended are not ſufficiently certain, and ſome falſe.

You are to be ſatisfied that all the innuendoes laid in the information muſt be *exactly* as they are explained: Some are not *neceſſarily true*, and ſome *neceſſarily falſe*. If this be ſo you muſt acquit him: For your verdict muſt go upon the *whole*; the judgment muſt follow it; and there can be no ſeparating the guilt afterwards: So that you cannot find but on the whole.

This day eighty-four years is not an æra applicable to the revolution, which is known to have commenced in 1690.

Glorious revolution, g——s r————n, at the end of the information. How glorious revolution? Is it not more conſiſtent with the purport of his letter that he ſhould call it graceleſs rebellion, ſuppoſing him to take his premiſſes as admitted?

A paper cannot tend to excite ſedition, of which Mr. Attorney-general could not find out the meaning. And I contend the meaning of theſe words and dates is ſometimes palpably miſtaken, and at other times far from clearly diſcovered.

I apply to you as friends of the liberty of the preſs, which appears in ſome degree of danger, when ſuch a ſtupid performance is ſo ſolemnly attacked as dangerous; as friends of the government, as unjuſt ſentences caſt an odium upon that; as friends of law and of liberty, which alike require that no man ſhould ſuffer upon a vague and doubtful interpretation of his words.

Lord *Mansfield*—Gentlemen of the jury, this is a paper charged in the information as a falſe and ſeditious libel on the revolution.

The revolution is the baſe on which the preſent conſtitution reſts; if that fall the whole ſuperſtructure falls with it, and all the bleſſings that have been and are enjoyed in conſequence of it.

It does not follow that the libel muſt be ſo *cleverly* written as to have it's effect. The dullneſs of the author, or the good ſenſe and honeſty of the readers, with the firmneſs of government, may all equally fruſtrate this: But the author is not the leſs criminal for doing all the miſchief he could, and intending more.

If you find that it arraigns King *William* the third and Queen *Mary*, not in their perſonal character, but as dethroning their father, as being an unjuſt and wicked act, this, certainly, arraigns the revolution.

If the dates do not preciſely anſwer it is not material, if the meaning is clear.

The evidence is very clear. Mr. *Hardinge* has rightly argued that you muſt ſee the author *meant* what was imputed to him. It is not that he is *accurate* as to *dates* and hiſtorical facts. You muſt ſee what ideas the author *meant* to convey, according to your *ſenſe* of what he has wrote.

I don't know as to the point of hiſtory what day preciſely Kin *William* and Queen *Mary* were proclaimed. King *William* lande in *November*; but it was not till after the convention, ſome month after his landing, that they were proclaimed. If you think th meaning of K. *W*——— and Q. *M*———, g——s r———n, and ſo of the reſt imputed to him by the information, be the *true* one you will find him *guilty*; if not you will *acquit* him. What wil be the conſequence of your finding is matter of another judicature.

As to many other things which were argued, they may properl go into conſideration upon the judgment paſſed on this letter, which I think, is, as it has been ſtated to be, a very *ſtupid* one.

The jury went out, and returned ſome time after, and found de-fendant guilty.

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* I believe *Feb.* 13, 1689.

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The ſame day another information was tried againſt the other *Woodfall*, as I underſtand it, and I believe for the ſame paper.

For the proſecution—That the paper in queſtion is one of the moſt general libels ever written. That it traduces every magiſtrate in this kingdom, and almoſt every profeſſion; and throws odium upon the revolution, as the ſource of all the curſes and calamities of this nation. That one would wonder any *Engliſhman* ſhould hope to give an ill impreſſion of that event, to which every *Engliſhman* owes the higheſt bleſſings, and the greateſt ſhare of liberty any nation ever enjoyed.

It is ſaid it is a ſtupid work. "The characters and things ſlan-"dered are out of the reach of ſlander."

The author has been as ſcandalous and malignant as his underſtanding would ſuffer him to be, and his dulneſs has been no great hindrance in this, as it ſeldom is. As to the effect—Where is the merit of having been diſappointed in a plain avowed purpoſe of prepoſſeſſing men's minds againſt the revolution, and of courſe the preſent government?

I never yet heard that the weakneſs of the writing, and the brightneſs of the character which was impotently attacked, ſhould be an argument in favour of the writer. Of both you will judge.

As to the application, every attempt concerning that, either to juſtify or to alter it, would prove alike uſeleſs, as that has been already made. Nor can argument make the interpretation on which the proſecution inſiſts clearer than it is.

The letter ſpeaks of the curſe denounced on that day againſt him who curſeth his father, and then infers the judgment againſt him who proſcribes his father, and hires others to murder him with his money.

He imputes all the taxes that have ſince been introduced, penſions, ſtanding armies, corruption of religion and morality, to that period, " and ſays the church of *England* was flouriſhing before, and now, " without the ſpirit of prophecy, a man may ſay is periſhing."

" Who can ſay that the rebellion againſt *James* was not a g——s " r——n?"

The ſtreſs was endeavoured to be laid that he was in cuſtody: But there appeared to be acceſs to him by any who pleaſed.

The letter ſays, " If theſe taxes are a bleſſing the revolution is a bleſſing; if not, a curſe. When he has told you religion and morality are corrupted, the church periſhing, the ſtate falling, in conſequence of the revolution, which he does, only in more words, can it be ſaid that he leaves it hypothetically, and without deciding one way or the other, whether the revolution was a bleſſing of the contrary.

For the defendant. Mr. *Lee*—It is not my purpoſe to defend the paper, if it contains reflections upon the revolution, and upon the character of King *William* and Queen *Mary*, whom I have been ever accuſtomed to hold from infancy as moſt illuſtrious princes, for their public and private virtues. And I hold the revolution to have been the æra from whence our moſt valuable liberties were ſecured to us; for permanent enjoyment; and that the rights and privileges to which we owe all our bleſſings were then better aſcertained than at any former period.

But you are now not upon the paper or author, but the publiſher. If you find him innocent of the *intention* to publiſh you muſt acquit him: For if his *mind* is innocent the *man* is innocent. You are not to find that the paper was publiſhed, or libellous in itſelf; both are admitted; but that Mr. *Woodfall* was the publiſher: And he cannot be the publiſher if he knew not of the publication. His life and character go againſt it. And though he might have offended perſons, and poſſibly ſometimes offended the *laws*, yet he has always been the defender of this glorious revolution.

There is no tittle of evidence he knew it, except that it was publiſhed and ſold in his ſhop. Upon this general evidence the proſecution reſts: And though it may be good and ſufficient in general caſes, yet not in this particular one, when Mr. *Woodfall* was in confinement, and not in power of converſing with thoſe from whom he could naturally aſk information upon ſuch ſubjects.

It is extraordinary that the accidental publiſher of ſo dull a pape ſhould be expected to incur the puniſhment and cenſure demanded againſt him, when *Sidney* and *Ruſſell* have been inſulted, and no enquiry after the author by way of puniſhment. A writer ought to relate *facts*. Let him; and if he credits his intelligences let him, and thoſe of his readers who are diſpoſed: But let him not cloſe hi narration with obſerving that he feels the ſame emotion he ſhould have done at the ſight of his ſon turning his back on the day o battle.

What is there in the work now before you to catch the humour or, as ſome may call it, the faſhion of theſe times? What is ther

t

to hurt the principles of the revolution, to ſhake the preſent government, or diſturb any man? But, above all, what is there to fix it on the defendant, who was in priſon, and ignorant of the publication?

Lord *Mansfield*—Gentlemen of the jury, whether this be an object of magnitude enough to demand this mode of enquiry is not before you or me: We muſt do juſtice upon that which is now before us.

Mr. *Lee* has very properly acknowledged the criminality of the ſentences conveyed in this letter upon the revolution and the inſtruments of it.

Whenever a man publiſhes he publiſhes at his peril: For there is no entering into the ſecret thoughts of a man's heart.

If he had been in cloſe cuſtody, ſo that his ſervant could have no acceſs there, I ſhould have thought it a difference very proper to have been left to you; but it is juſt the ſame as in his own houſe; for his ſervants and all the world had acceſs: And the boy brought the paper to him *every* day.

Otherwiſe I ſhould have thought the particular circumſtances very proper to have taken it out of the general caſe; but here it is juſt as in the caſe of laſt *Saturday*. He either did or did not know it; if he did he is anſwerable, upon that caſe; if not he *ought* to have known it. What may be the conſequence is a farther conſideration; and what the magnitude of the crime, or the wiſdom and prudence of bringing it to this mode of deciſion. We are bound to do juſtice on it, whatever may be the conſequence, or importance of the queſtion, more or leſs. If you believe the evidence, as to the publication, and the intent of the paper, as ſtated in the information, you will find the defendant guilty; otherwiſe you will acquit him.

Jury came in after ſome hours, and found the defendant guilty of publiſhing the *paper* ſtated in the information; but did not find it a libel.

Lord *Mansfield*—You muſt either find the defendant generally guilty, or find what you do find.

They found him guilty of publiſhing the paper.

Lord *Mansfield*—That is, you find the defendant guilty.

Verdict taken accordingly.

Judgment. And now, *Michaelmas* term, 26th of *November*, 1774, Mr. Juſtice *Aſton* delivered the judgment of the court againſt *S.* and *H. Woodfall.*

You are brought up to receive judgment for printing and publiſhing a very ſeditious and ſcandalous libel, which appears to the court of a very pernicious and dangerous nature. A libel on the revolution; on the King and Queen who reigned at that happy time.

The army repreſented as locuſts, the church as periſhing, religion and morality as utterly extinguiſhed in all ranks of men, and a general curſe upon the nation in conſequence of the revolution. The weakneſs and ſtupidity of the libel is no excuſe; that it will not affect *wiſe* and *conſiderate* men; it is not thoſe on whom it was meant to operate.

The court has conſidered the nature of your offence, and the circumſtances offered in mitigation.

And as to you *Woodfall*, your particular ſituation at that time, which ought to have made you more cautious; and to ſuffer it to be an excuſe would be opening a door for all libels with impunity.

The court ſets a fine of 300 marks upon you, and that you be impriſoned till paid.

The ſame fine upon the other.

Mace *againſt* Cammel.

A Woman lives with a perſon as his wife, and, upon execution levied on the goods for the debts of his creditors, ſhe denies that ſhe is his wife, though ſhe had always paſſed, and been acknowledged and reputed to be his wife. And ſhe contends the goods are her ſole and ſeparate property, and bought with her money.

By the 21 *James c.* 19. *ſec.* 11. It is enacted in caſe of bankrupts "*that if at any time any perſon or perſons ſhall become bank-*
"*rupt, and at ſuch time as they ſhall ſo become bankrupt ſhall, by the*
"CONSENT *and* PERMISSION *of the true* OWNER *and proprietary*
"*have in their poſſeſſion, order, and diſpoſition, any goods or chattels*
"*whereof they ſhall be reputed owners, and take upon them the ſale,*
"*alteration or* DISPOSITION *as* OWNERS, *that in every ſuch caſe the*
"*ſaid commiſſioners, or the greater part of them, ſhall have power to*
"*ſell and diſpoſe the ſame, as and for the benefit of the creditors which*

"*ſhall ſeek relief by the ſaid commiſſion, as fully as any other part of*
"*the eſtate of the bankrupt*; *and* FOR THE BETTER PAYMENT
"OF DEBTS, *and diſcouragement of men to become bankrupts*."

The principal queſtion ſeemed to be whether this could be extended to a diſpoſition of the goods of another, in the caſe of a perſon not within the ſtatute of bankrupts; ſo as thoſe goods, of which the debtor had acted as oſtenſible owner, ſhould be taken under an execution for the benefit of his creditors.

And I think it was chiefly argued, they could not upon theſe two points.

1ſt. That the *preamble limits* and declares the meaning of every ſtatute, and the *preamble* of the ſtatute of *James* ſpeaks of *bankrupts only*.

2d. That the enacting clauſe ſpeaks only of bankrupts.

3d. That this is a *penal* ſtatute and muſt be conſtrued *ſtrictly* to the *letter*, and not carried beyond to what is neither within the words nor profeſſed view of the act.

Vide Green's preface to the ſpirit of the bankrupt laws.

On the other ſide—1ſt. That many times a law was made to remedy a particular inconvenience declared in the preamble; but then the intent of the legiſlature, on the enacting part, went on to remedy or prevent evils of a ſimilar nature.*

2d. That one expreſs object is for the better payment of debts. And that it would be ſtrange if a perſon by not being a trader, and therefore not obliged to run the ſame riſque of his fortunes, ſhould not only eſcape all the penalties of the bankrupt laws himſelf, but ſhould have it farther in his power to ſhelter the property of others, uſed by him as his own; and lent him with a fraudulent purpoſe to deceive his creditors, by an oſtenſible ownerſhip and a falſe ſecurity.

3d. Next that at common-law a ſecret transfer of *moveable* goods was always a *badge* of fraud; and ſo in all caſes where the *apparent* ownerſhip was ſeparated from the *real*; and in ſuch caſe it is better that the owner who has equivocated thus againſt good faith and mutual credit—by outwardly *abandoning* his claim or giving it over to another, and by a covert reſervation retaining it—ſhould ſuffer, than the innocent and abuſed creditors.

4th. That in this caſe, the woman who claims theſe goods, having aſſumed to herſelf the character of the wife of him whoſe goods were taken in execution, having been acknowledged by him as his wife, having been generally and conſtantly reputed to be his wife,

upon

upon the faith of the appearances and declarations held forth bot by him and her, ſhall not now ſay to his creditors, I am not hi wife. The goods on which you relied as part of your ſecurity f your *juſt* debts, which you knew to be in the houſe; which I, b calling myſelf his wife, and gaining credit as ſuch, did more ſtrongl than by any words aſſure you were his, and would be yours if you legal demands were not otherwiſe anſwered, are not his but mine And though I had the advantage of paſſing for his wife, and helping him to deceive you by that advantage, to the detriment and perhaps ruin of yourſelves, I will not ſuſtain any part of the burthen “ I will be his *wife* for all purpoſes of my own convenience, and I “ will not be his wife for any purpoſe of doing you juſtice.” Sh can never be permitted to uſe a conduct which ſpeaks this language and produces theſe conſequences.

The court was of opinion, and Lord *Mansfield* delivered the judgment to this effect.

After ſtating the caſe.

Paſch 24. Eliz. 3. Rep. 80.

It is queſtioned whether the *enacting* clauſe of the ſtatute o *James* went farther than the *preamble*. If it did not it would be *ſtrange*, becauſe, ever ſince the caſe of *Twynne*,* the apparent fraud would make ſuch an act void † as this, which, ſince that caſe and *ſince* the ſtatute of *James*, is now contended to be good.

But one point makes this very clear in this caſe which is—ſhe *paſſed as* his *wife*, and carried on affairs as ſuch; and it ſhall *never* lie in *his* mouth, nor in *hers*, afterwards, to ſay ſhe was *not* his wife.

In a caſe at *Guildhall*, where a woman had paſſed as *ſingle*. I would not permit her afterwards to ſay ſhe was *married*, when dealings and trade had been carried on upon the faith of her being *ſingle*, and upon the credit of her *ſolvency*, and not that of the man whom ſhe was pleaſed afterwards to ſet up to the creditors as her huſband, and the perſon on whom they muſt be content to rely for payment of the debts. So that we think upon this point the caſe is clear.

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1. Dona clandeſtina ſunt ſemper ſuſpicioſa.
2. Fraus et dolus nemini patrocinari debent.
3. Qui alium rebus per vim aut dolum ſpoliare vult ſuas amittito.
Fraus contra alios irrita contra fraudatorem valet.

Nihil calliditate ſtultius.
Decipi quam fallere eſt tutius.

Indictment.

ON an indictment for perjury in an affidavit; the perjury was charged that the defendant ſwore in his ſaid affidavit to the *purport* * and effect following.

And it ſets forth the affidavit; but there is inſtead of the word "underſtood" *undertood*, that he the defendant ſwore he *undertood* that, *&c.* whereas in truth and in fact, *&c.*

They came after verdict to quaſh the indictment, and ſet aſide the verdict upon this exception.

It was argued, 1ſt. That this was a flaw in the indictment, in the material part of the charge in the aſſignment itſelf of the perjury, and therefore fatal in an indictment.

2dly, That a verdict would not help it; for though for the ſake of ſettling *civil* property, the law had permitted ſuch faults to be cured by a verdict; yet no law had ever yet been thought proper to be introduced by the legiſlature to leave any thing at large, where the property, life and liberty, of the ſubject was concerned.

On the other ſide, that this "*undertood*" being totally inſenſible, was *not* a *word*, but would become a *word*, according to the ſenſe and truth by reſtoring the s, which had eſcaped the pen; therefore, that this was no caſe of one word for another, or of a word too much or too little, but only of a letter omitted; by the omiſſion of which no doubt or new ſenſe was introduced; and caſes were cited to ſhew the difference.

The court took time to conſider; after which the judgment of the court was delivered by Lord *Manſfield*.

This is the caſe of an indictment for *perjury*, and it comes before the court on the reading of *undertood* for "*underſtood*." The jury read it *underſtood*, and this comes before the court to *cure* that verdict and ſet it aſide.

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* So, I think, it was; not tenor, *vide* the diſtinction in *Wilkes*'s caſe, Sir *James Burrow*, part 4. vol 4. And *Note*, I underſtand that theſe laſt ſittings after *Michaelmas* term 1676, before Lord Chief Juſtice *De Grey*, Lord *Chatham* was nonſuited in a proſecution againſt a printer for publiſhing a pretended letter of his Lordſhip's; the indictment ſetting forth that the tenor of the ſaid pretended letter was as follows: And in the ſetting forth of the ſame the word "vigour" was uſed inſtead of rigour. And I hear Lord Chief Juſtice ſaid, he would not ſay whether *purport* would have done. But in that caſe there was this farther difference, that vigour was a word not *inſenſible*.

Some of the caſes are very *nice*, and to be ſure there is a great deal of nicety in *criminal* proſecutions, and the law *ought* to be *certain*. And the caſe of *Hunt* is brought: But the authority of *Hawkins denies* that caſe.

And the diſtinction ſeems to be where the word is made a *different* word, *admittat* inſtead of *amittat*; there the indictment is bad. But a difference in the ſpelling of the word whereby no *new* word is produced, nor the real one poſſible to be miſtaken, will not vitiate the indictment.

Though the criminal proceedings ought to be extremely *accurate* and *ſtrict*; yet to ſet a judgment of the jury upon ſuch a nicety would be very bad.

RULE DISCHARGED.

His Lordſhip cited the caſe of the *Queen* and *Drake*.

Peremptory.

Vide The motion in the caſe of General Moſtyn, ſuper.

PEREMPTORY will not have effect, where without fault of the party a witneſs cannot be had.*

Popham *againſt* Eyre.

Curia Cancellaria.

ON an appeal from the decree of Sir *Thomas Sewell*, now maſter of the rolls, for performance of a ſpecific agreement.

It was on a bill brought againſt Mr. *Popham*, as heir of his father; Lord *Mansfield* as mortgagee of the eſtate, and the purchaſers after the treaty was broke off between *Eyre* and Mr. *Popham*, to enable them to *compell* Mr. *Popham* the heir to a ſpecific performance of the agreement between his father and Mr. *Eyre* the plaintiff. And his honour, after ſeveral hearings, *decreed* a *ſpecific performance*, and made directions accordingly; from this *Eyre* and the other parties (excepting Lord *Mansfield*) *appealed*. But Lord *Mansfield* was not included in the decree before the maſter, they having dropt his Lordſhip's name before.

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* Lex neminem cogit ad impoſſibilia.

The caſe ſtated on behalf of the appellant *Eyre* was this.

That his father thought himſelf deceived by change of the name of the purchaſer, and that therefore he did not execute, and refuſed unleſs the money were paid down.

And that he cannot execute the conveyance, becauſe already made and complete with his father.

That the defendant is ſon and heir to his father.

Diſpute which ſide ſhould begin to ſtate.

Wherever it is an appeal from a particular part of the decree, the appellant goes on firſt.

But where the bill and anſwer is opened, there, *per Cancellarium*, it ſhould ſeem the plaintiff in the original cauſe ſhould begin; becauſe he is called to ſhew his cauſe againſt the appeal, and the ſpecific agreement is to be enforced on hearing all the evidence.

Argued, for the reſpondent, that he is heir to his father, had the eſtate of which his father had propoſed to diſpoſe.

That 16500 *l.* was the price on which they entered into treaty.

That 17000 *l.* was the price underſtood.

That the agreement was declared by the plaintiff's agent in writing, to be conſidered by him as actually compleated.

That the alteration of the name of the purchaſer was made by conſent of the defendant and approved.

That Mr. *Popham* ſaid, the reaſon of his refuſal to execute the agreement was, becauſe he underſtood the agent meant to purchaſe for himſelf; and he did not know whether Lord *Mansfield*, the mortgagee, would give up the deed, or whether the money was ready to be paid.

A very idle objection; becauſe the money was ſecured him at any rate; and upon payment there was no reaſon to doubt the deeds would be delivered.

The defendant before the maſter was ordered to put in an anſwer, and then to put in a farther anſwer; and before this there came out farther evidence which made it neceſſary to amend the bill.

The defendant, the covenanter, made a new agreement with Mr. *H.* for the ſale at the original price propoſed to the other; there was no poſſibility of including this in the bill, becauſe it was after the bill brought. The ſecond covenantees intereſt depends on the indemnity given; yet 16500*l.* is to repay them, and the eſtate to be ſecured.

The objections before the maſter, That *this* is a verbal agreement not in writing, and therefore within the ſtatute of frauds.

Two letters (the ſecond ſubſcribed) that he would not take leſs than 17000*l.* this underwriting, and he confeſſes the agreement in his. The anſwer, and this would take it out of the ſtatute of frauds upon a full evidence. Though there was a verbal agreement which the court would not have decreed, yet if the defendant *admits* in his anſwer, the court will decree a performance. *Groſton* and *Laves*, Eq. Ca. abridged, if there be a *parol* agreement, yet, if admitted in anſwer, the defendant ſhall be compelled to perform it, for there is no danger of perjury, which is what the ſtatute meant to prevent.

Lord Chancellor—*Worſley*—4 *G.* 2. *E. T.* Bill brought for *ſpecific* performance of an agreement; the defendant pleaded the ſtatute of frauds and perjuries. It was doubted whether he ought to ſet out the ſtatute of frauds and perjuries, the Chancellor at firſt thought he ſhould be farther heard: But afterwards that it was exceedingly improper, for then he muſt admit the agreement, and there would be an end of the ſtatute of frauds and perjuries.]

The argument was continued upon the objection of Mr. *Popham* to inforce this argument; that it is a conditional agreement, becauſ the money was to be paid at a certain day and has not been paid.

That the agreement had been varied ſince the writing; that inſtead of 16500*l.* to be paid down, 10000*l.* was to be paid, and th 7000*l.* taken as a ſecurity on the eſtate. This is by the agreemen of the covenantor himſelf, and then, ſhall he ſet up his own act a a bar?

He underſtood Mr. *Baldwin* was to be the purchaſer, and wa deceived in this, is *another* objection. And that he thought *Eyr* could not pay the money, and then upon Mr. *Baldwin*'s undertaking for the money he ſtill continues the objection, though he ha what he deſired.

Philips v. Duke of *Buckingham.* 1 *Ver.* 227.

The caſe in *Vernon* was a treaty with the Duke of *Buckingham* the treaty broke off, and Mr. *Philips* contrived that the ſecretary t Lord Chancellor *Nottingham* ſhould enter into a treaty with th

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Duke and not name him; and that Mr. *Nicolls* would ſay he was treating for Lord *Nottingham*, or Mr. *Finch* his ſon. It turned out that there was no authority from Lord *Nottingham* or his ſon, and therefore the court would not decree a performance.

There the purchaſe was pretended for Lord *Nottingham* or his ſon the Solicitor-General. The Duke, being willing to oblige any of that family, offered the eſtate at his *own* price. Afterwards he entered into a treaty, and on diſcovery refuſed to ſign the articles, or make make conveyance. The Lord Keeper decreed that there had not been fairneſs uſed; that Lord *Buckingham* having a great regard to Lord *Nottingham* and his ſon, declared he would ſell cheaper than to any other purchaſer.

But if Mr. *Finch* had appeared, and affirmed the purchaſe he would have decreed, and he might have ſold the next moment to Mr. *Philips*.

From the defendant's Anſwer.

The defendant acknowledges that he was informed of an intention of Mr. *Eyre* to purchaſe, and anſwers in that paper which he confeſſes writing, that he would not ſell for leſs than 17000 *l.*

Mr. *Eyre*'s agent writes in anſwer to this, Sir, I have communicated what you write, that you would not take leſs than 17000*l.* and though Mr. *Eyre* conſidered the agreement as abſolute for 16500*l.* yet to ſave farther trouble he will give 17000*l.* and this concludes the agreement. However, for my ſatisfaction, I deſire you would *give me a line under your hand.*

Lord Chancellor—Read the ſecond anſwer.

Objected by counſel.

Lord Chancellor—If you read the *confeſſion* of an agreement out of an anſwer, you muſt read all that is relative to the agreement.

In the ſecond anſwer—The deponent begs leave to refer to his letter.]

Mr. *Baldwin* complains to Mr. *Popham*, is ſurprized to find by Mr. *Stokes*'s letter that the affair is *not* completed, and that he appears not apprized of the ſcarcity and value of money at this time. However it is *very well*, as he is concluding an affair which may prove much *more beneficial:* If Mr. *Stokes* and you ſhould after all ſettle, as I apprehend certainly you will, I ſhall be at the *Crown* and *Anchor*.

Lord Chancellor—Does any thing appear in Mr. *Stokes*'s anſwer?

Letter importing Lord *Mansfield*'s agreement to accept of 10000*l.* and the eſtate as ſecurity for the remaining 7000*l.*

Reciting the contract and that it was not reduced into writing,

And he brings an action for non-performance of this very agreement.

Mr. *Eyre* brings an action for non-performance of this agreement. Inſtead of 17000*l.* the eſtate is ſold now at laſt for 16500*l.*

The caſe referred to proves the ſeller was impoſed upon. He meant to favour the family with whom he lived, and underſtood himſelf to be treating. That gentleman did not claim as a purchaſer, therefore no body could. This is a ſale by public auction; he only wanted the *money*; if he had the *money* this was enough.

Argued on the other ſide—that the maſter of the rolls was wrong, in decreeing the ſpecific performance of the agreement.

The eſtate is like all others in the Weſt of *England*, continually *increaſing* in *value*, becauſe the rents in the eſtate are upon lives, and conſiderably *leſs* than the real value; while the agreement is in ſuſpenſe the lives are wearing out.

Seven years from the treaty they come for a ſpecific performance, on payment of 17000*l.* for the eſtate, which they were to have paid *ſeven years* ago. It is an application againſt an heir—the diſadvantage would be to the heir 5000*l.*

It has been thrown out that we have been ſo fooliſh to ſell the eſtate for 16500*l.* the eſtimate made ſufficiently ſhows, that a perſon who had an eſtate in mortgage gained by ſelling as *early* as poſſible; and the perſon who comes for an equitable relief does not come very favourably when he objects a ſale under value, to which he has driven the party againſt whoſe heir he claims.

It is ſtated there are certain *general* rules for performance of ſpecific agreements. If the court were to lay down general rules, without exception of circumſtances, for performance of a ſpecific agreement by which a party ſhould be compelled, it would in truth compel to a greater hardſhip than thoſe of common law. From their generality and rigour the court would then be a legiſlation ſuperior to the common law, and much ſeverer. Indeed if the court were to lay down any rules whatever in this matter then circumvention would be favoured, and the rules of the court would be made the inſtrument of *mere fraud*.

There is a great deal of difference between an agreement which will entitle to *damages* at common law for *non-performance*, and an agreement which will be carried into *execution*;

Where the damages would be greater to a party by carrying an agreement into execution, than any damages a jury would give, then equity will not *decree*. This I argue with the more confidence, becauſe your Lordſhip laid it down in the caſe of *Pope* and *Harris*, and it was *affirmed*, and taken on the ſame grounds by the Houſe of Lords.

As to the remark that courts of equity have made rules that where an argument is *admitted*, it ſhall be ſame as in writing; equity will always take care not to ſuperſede any object deſigned to be ſecured by an act of parliament.

The end of the ſtatute of frauds was, that the *truth* of the articles ſhould be *known*.

If the anſwer be taken as an agreement in writing, the anſwer of a perſon of a delicate conſcience will make a great difference to his diſadvantage, from the anſwer by a perſon of an hard and ſtubborn one, who would ſwear away the agreement. This difference a court of equity will not be anxious to introduce.

The terms of payment will not appear with that *preciſion* and certainty: And wherever the *time* would be very material (as in the caſe of performing an agreement to a *mortgagee*) your Lordſhip will not decree *againſt* one of the *moſt important* terms of the agreement; ſince he cannot pay the mortgage, and muſt pay a *greater* intereſt than he ſhall receive *rent*.

Unleſs the anſwer could be ſo particular as to ſatiſfy *all* the objects of the agreement, had it been reduced into writing, equity will not decree. Beſides it muſt be ſeen firſt, that this is an agreement proper *ever* to have been put into execution.

Very early Mr. *Eyre* propoſed, which alarmed Mr. *Popham*, who declared he would not deal with him or any gentleman of his profeſſion (he was an attorney) unleſs the money were laid down.

Mr. *Eyre* prevailed upon ſome body of the name of *Baldwin* to enter into this treaty. Mr. *Popham* would have been ready to enter into the treaty, provided the whole treaty had been to be performed on their part. The whole money was to be paid at *Lady-day* following. This is the firſt treaty; it was *varied* afterwards. They muſt ſhow *which* of the *ſpecific* agreements remains to be performed.

Mr.

Mr. *Popham*, as having been diſappointed of receiving the 10000*l.* being obliged to pay the intereſt from the time in which he ſhould have paid the money, little ſtreſs is to be laid on his bringing an *action*.

Suppoſing the action (which was dropt) could have been maintained for *damages*, does it follow from thence that they were entitled to the *ſpecific* performance of an agreement, for the non-performance of which Mr. *Popham* was to have had *damages?* Are there any caſes which ſay a perſon who has been *dilatory*, and expoſed himſelf to an *action* by his *delay*, ſhall have a right to *compel* a *ſpecific* performance of that agreement which was *delayed* by *himſelf*.

The doctrine is rather contrary to this poſition in *Hazes* and *Carrell*, *Viner*, title contract, *pl.* 18. where a party has *trifled*, or ſhown any backwardneſs in performance of his part a court will not interpoſe; and eſpecially if *circumſtances* are *altered*.

Can there be a greater alteration of circumſtances than an agreement for 17000*l.* which would have ſatisfied inſtantly, and the ſame 17000*l.* with the loſs of *all* the intereſt to which Mr. *Popham* by that delay was made liable, on inability to pay off the mortgage.

The memorandum on which they ſay this agreement was entered into is thus; propoſal of 16500*l.* Anſwer—He would not take leſs than 17000*l.* Had it ſtood there could it have been contended in this court that this was a complete agreement according to the ſtatue of frauds?

No farther was proceeded in the agreement on one ſide than *propoſal* of a ſum, and on the other the ſum laid down under which he would not part with the eſtate. Is this an agreement in writing? If the ſtatute of frauds were to be thus contrived it would be virtually *revoked*. If the haſty tranſactions of perſons in the commencement of a treaty were to be taken as a complete agreement, the caſe would be worſe *ſince* the ſtatute than it ever was *before*.

The anſwer is thus—Mr. *Finch* has communicated the contents of what you wrote with your pencil under Mr. *Baldwin*'s letter, that you would not take leſs than 17000*l.* And although he conſidered it as an actual bargain for 16500*l.* yet as he had acquainted ſeveral of his friends upon the ſubject, notwithſtanding your refuſal to take leſs than 17000*l.* he will be ready to give that ſum which *concludes* the agreement.

" But, for *my* ſatisfaction, I deſire you would give me a *line under your hand*." Was not this to draw him within the ſtatute?

Mr. *F.* the agent for *Baldwin*, propoſes an agreement for 17,000*l.* and deſires him to ſign a writing, which would be more to the ſatisfaction of Mr. *Baldwin* than any thing he could ſay.

And Mr. *Popham*, finding it to be inſiſted on as an abſolute agreement, refuſes, as it wanted the moſt *important* article, the *time*.

The agreement, ſays Mr. *Baldwin*, Mr. *Eyre*, and his agent, is concluded by the rules of this court, as we are *adviſed*; they wanted abler adviſers. " The day is not at all material; if you loſe 12000*l.* " before the agreement ſhould be completed it is not material; it is " a complete agreement for us. You will be to go into the Exche- " quer; we ſhall have an opportunity of getting rid of the eſtate in " *parcels*, which, I tell you, is a very good bargain; and therefore " we are *both* tied, but we with a *looſer* chain; and you will have " to run through a court of equity before *we* are obliged to *pay* the " money. And if you *ſell* it to any perſon elſe we will make you " hear of it in the court of Chancery." This is the kind of language ſpoken by the conduct of theſe gentlemen who come for a ſpecific performance.

The agreement was ready for Lord *Mansfield*'s acceptance; Lord *Mansfield* accepted; Mr. *Popham* was ready; they were *not* ready at the firſt day; nor on the 22d of *June*, which *laſt* day is ſubſequent to all the evidence they read in the caſe.

They propoſed the conveyance on the 28th of *June*, with Mr. *Eyre*'s name, but not the money. And then he might well ſay, " If I am to be driven to an agreement with Mr. *Eyre*, with whom " I have declared I would *not* treat, inſtead of Mr. *B.* with whom " I had declared I *would* treat, I will not go farther."

This caſe is ſaid to be diſtinguiſhed from the caſe of *the Duke of Buckingham*. The diſpute there was not whether the *whole* value had been offered; and I refer your Lordſhip to the report of the caſe, where the parties would not go into the queſtion of the value.

And the court determined they would leave the election to the vendor, and he would enter into an agreement with a perſon in whom he had a confidence, and not another, with whom he had not; which is the very determination the heir of the vendor now prays and expects.

It cannot conſiſt either with that *common ſenſe* to which, in an idle way, we are accuſtomed to appeal, or with the more *circumſtantial* and *certain* rules of equity and juſtice, that an *executory* agreement with the *one* ſhould be the ſame as with the *other*. And there is here this farther difference between an *inſtant* agreement, which he, the defendant, expected in this caſe, and which was *neceſſary* for his circumſtances, and an *executory* agreement, which in his circumſtances was ruinous.

They have not ſtated *any* one *certain ſettled explicit* agreement, like that which the ſtatute ever expected to ſee in writing; like that which this court *will* expect to ſee *ſome way*, in order to entitle to a *ſpecific* agreement.

And if the ſtatute is to be conſtrued *liberally* (this is the only rule by which parties are to be bound, if they are to be bound, in *equity)* they are not to be in a *worſe* condition than if bound in *law*. What is the agreement by which they are to ſhew title to a ſpecific performance?

Mr. *Eyre* had ſaid he wanted to buy the eſtate to ſell again to advantage. This in the outſet of the affair: And it was a pretty ſtrong objection, eſpecially when he did not pretend to have more than 6000 *l.* to pay for it.

Mr. *F.* to enquire whether Mr. *B.'s* purchaſe was completed, and if not, to know what obſtructed it.

March 17.

Application to Mr. *B.* when he would complete, and to fix a day, as the eſtate was offered a thouſand pounds cheaper than it would have been to any other perſon, on account of *prompt* payment.

" Mr. *Popham*, thinking himſelf bound in honour to diſcharge his
" debt to Lord *Mansfield*, if you do not give a peremptory anſwer,
" he ſhall think himſelf at liberty to treat with another purchaſor."

Treaty reſpecting the ſale was in ſubſtance this: It was offered at 18000*l.* at *Michaelmas*, 1766. Offer to Mr. *B.* without any other than a verbal agreement, *March*, 1767, for 17000*l.*

The agreement which the court would enforce muſt *fully*, *exactly* and *completely* appear: And not only this, but it *muſt* be ſuch as the court will decree a ſpecific performance, from the reaſonableneſs and fairneſs of it, both at the *time* of *agreeing* and *when* it is prayed to be enforced.

There muſt be *full* evidence, and the court may exerciſe their juriſdiction as a court of conſcience, as in caſe of an *additional* remedy *beyond* what the parties can have at *law*. If the agreement *not* complete; if *fraud* intended, with reſpect to purchaſors; or *circumſtances* or *eſtate altered*; or the agreement, though *equal* at *firſt*, is ſuch as would be *injurious* by a *ſubſequent event*; the court will not *decree*.

Mr. *Baldwin* does not underſtand it a complete agreement; for after this writing he writes and aſks whether it's *ſettled?*

He talks of a more advantageous treaty. The agreement drops.

Mr. *Popham* ſays he would not take leſs than 17000 *l.* he does not ſay what he will take.

Bawdes *and* Amhurſt.

1 *Equity Caſes abridged*, 27.* On a marriage treaty the lady's father agreed to give 4500 *l* portion, the ſettlement to be made four or five hundred pounds *per annum*; the proper heads ſet down by a clerk. The father fell ſick and died; the match *completed*; and then the performance of the agreement was inſiſted. Lord Chancellor ſaid he never knew an inſtance in which it had been decreed an agreement ſhould bind where nothing had been done by the parties ſigning, or in part executing, though wrote by their orders. They were only *heads* ſet down, which might have been *altered* or *rejected*.

Mr. *Popham*'s agent, Mr. *Stokes*, has done nothing to approve of Mr. *Eyre*. Whatever the motive, a court of equity will not decree for Mr. *Eyre* a ſpecific performance of an *underhand* agreement, carried on in the name of another perſon.

This court has been ſo jealous of giving a ſpecific performance of agreement as an additional remedy to what they might have had at law, that they have *declared* they would not carry them into execution, where there appeared to be fraud, trifling, or improper conduct.

In the caſe of *the Duke of Buckingham* they were ſtamped and inrolled, and yet the court would not execute them. It appears in this caſe there was a tranſaction in favour of a party all along with whom Mr. *Popham* had declared he would not treat. This will, therefore, take it out of the benefit of an equitable conſtruction of the ſtatute of frauds; eſpecially where there are ſubſequent circumſtances, which render the *ſpecific* performance extremely hard and unjuſt, and perhaps *impoſſible*.

If a party making an agreement may be delayed for a day more than the time on which he inſiſted in the agreement, he may be delayed a year, or for ever. The party on the other ſide may pay when he pleaſes, and inforce the agreement when he pleaſes, in ſpite of juſtice, equity, and the true underſtanding and object of the contract.

Wherever the time is material to the party it is an eſſential part of the agreement, and muſt be obſerved. Vide *Hayes* ——

Raym. Agreement to convey over if the title be approved by defendant or defendant's counſel at a time. The time *material.*

Gilb. 15. Covenant to make a good eſtate on a day certain. Decree in the Exchequer for a ſpecific performance of the agreement, but refuſed in the Houſe of Lords, the party applying not having proved that he tendered a title at the time ſtated, which was material, with reſpect to performance of the agreement.

It does not appear he was even on the 30th of *June*, even then, ready. Therefore he is left to ſuch remedy, if *any*, as he may have at common *law:* Having delayed Mr. *Popham*, who did not intend him to be the purchaſor, and having not complied with his agreement to pay the money, which was very neceſſary to Mr. *Popham.*

There was as much occaſion to include Lord *Mansfield*, that he would accept the money.

To conſider it now as it would have ſtood *independent* of the ſtatute of frauds.

Before the ſtatute the court would not execute if not ſigned by one party, or in part executed.

But if drawn up in writing, ſigned and ſealed, they would. *Marquis of Normandy* againſt *Duke of Devonſhire.* Execution of agreement by one of the parties ſhould bind both.

In this caſe there was no time where agreement was complete, nor was it ſigned by either party.

The party who applies for a ſpecific remedy has not conducted himſelf with that fairneſs and candour which the court expects.

When Mr. *Popham* diſpoſed of the eſtate he was to put *nothing* in his pocket, but merely to have money to pay off the mortgage: Therefore he refuſed Mr. *Eyre*, as not a ready money bargain.

After the diſtance and delays in Chancery he would be to loſe, even if intereſt were given him.

Sometimes a ſpecific performance has been decreed making a *compenſation*; but how is *this* to be made? There is not merely the loſs of *intereſt*, the ſale is hindered: The mortgagee holds. There is every delay and every inconvenience.

If you did not keep the propoſals the court will ſay you ſhall have no advantage.

The intereſt the court will give him after ſeven years is four *per cent.* againſt five, which is to pay the mortgagee on failure of payment at the day incurred by the fault of thoſe who come for a ſpecific performance.

This caſe depends much more upon facts than any reaſoning or nice points of law.

If this be to be taken as an abſolute agreement what will be the fate of propoſals from henceforth in the way of treaty? No perſon will ſay what he meant to ſell his eſtate for, as thereby the bargain ſhall be concluded at once.

Where the articles were *ſtamped*, drawn out, deliberately examined, the court would not ſuffer a perſon to come in who was not the intended purchaſor, but left him to his remedy at law.

The caſe of *the Duke of Buckingham* goes upon the deceit; the parties would not go to ſettle the value. The only difficulty was the reſcinding of a *ſolemn deliberate legal* act, which yet was reſcinded for the fraud; juſt ſuch a kind of fraud as in this caſe.

Scott and *Langſtaffe*, before Lord *Camden*, was to reſcind the agreement. Lord *Camden* thought fit to oblige *Langſtaffe* to pay the coſts. A bill brought to give up a leaſe on the hands of *Langſtaffe*, as obtained by fraud.

Lord *Camden*—The principle in equity is *clear:* But upon the evidence of the caſe the queſtion is ſomewhat nice. *Scott*, an illiterate gardener, having purchaſed an houſe of Mr. *P.* next to one in which Mr. *P.* intended Mr. *Garrick* ſhould ſucceed, and Mr. *P.* being unwilling Mr. *Garrick* ſhould have a diſagreeable neighbour, it is agreed between them, but not made part of the contract, that *Scot* ſhould not grant a leaſe of the houſe to any body not agreeable to Mr. *P.* or to Mr. *Garrick* afterwards, if he ſhould ſucceed, to prevent Mr. *Garrick* having a diſagreeable neighbour. *Scot* was applied

to

to by one *Langſtaffe* for a leaſe, but refuſed, unleſs *Langſtaffe*, who applied, had *P.*'s conſent. *Langſtaffe* ſaid he knew him *intimately*, and that there would be no objection. *P.* in fact diſapproved, and had never conſented to his being tenant, and, ſo far from knowing him intimately, he had only ſeen him at a tavern.

Lord *Camden* ſays, "*Langſtaffe*, a knowing attorney, has been "*miſtaken* in his *ideas* of *fraud*: Becauſe *Scot* did not ſay he was "*bound*, and he, *Langſtaffe*, did not ſay he had *P.*'s conſent; that "therefore there is *no fraud*. *Scot*, it is true, did not ſay he was "*bound* (he was engaged in honour), and *Langſtaffe* did not ſay he "had *P.*'s *conſent*; but he ſaid (which was a deceit) that he knew "him intimately, when he had only ſeen him once at a tavern.

"*Scot*, a gardener, afraid of a ſuit with *Langſtaffe*, a ſubſtantial "attorney, is very uneaſy. He delays the ſale till he has an *indemnity* from *Garrick*, then he joins. This is the caſe of *Philips and* "*the Duke of Buckingham*. No body who has read that caſe can "eaſily forget it. Let the agreement be ſet aſide with coſts."

What would have been the ſituation of Mr. *Popham* if no body would have *bid* upon the bill brought? He muſt have paid intereſt upon 17,000 *l.* and received but 40 *l.* rents for ſeven years, till the ſuit in chancery ſhould be ended. He was content, the ſtrongeſt proof of the hardſhip, to ſit down with the loſs of ſeven hundred pounds.

If no poſitive law had ever been made, and the caſe had ſtood without it, a court of equity would have ſaid it is *impoſſible* to aſſiſt this contract, obtained by *deceit* againſt a perſon in *difficulty* and *neceſſity*.

Conſidering it upon the ſtatute of frauds, where is the agreement ſigned by the party? Is it the writing with the *pencil?* Is it a writing not offering any general ſum, but telling him Mr. *Baldwin* would be at the *Crown and Anchor?* This the conſideration for Mr. *Popham*'s taking 17000 *l.!*

But the agreement is confeſſed in the anſwer.

The only ground of this being a general rule is in *Equity Caſes abridged*.

But it muſt be an agreement ſet forth in the bill, *confeſſed* and plainly appearing; and the ſtatute not inſiſted upon.

What is the *confeſſed* agreement? Not to take 17,000 *l.* at *any* time, but a *certain* day. It is not executed, nor can *now*; nor a compenſation be given.

The unexpected and ſurprizing event in their favour may ſave the diſmiſſion of the bill with coſts, which is all they can expect.

Wales and *Baynall.*

Mr. *B.* could not have been compelled. Mr. *F.* is a ſubſcriber to this pencil; he does not call himſelf a witneſs to it: It does not appear by what authority he ſubſcribed, though it may pretty clearly be gueſſed with what meaning. Six days after the laſt day, 30th of *June*, the deeds are delivered to be executed by Mr. *Popham*, who ſays he will have nothing to do with it.

The contract with the purchaſors for 16,500 *l.* was with honour, and the indemnity open, and with candour, to ſecure them at all events.

The ſubſtantial party is conſidered to be *Eyre*; ſo he was all along, in effect.

Eyre is rejected in *November*, 1766.

The agreement offered to be ſigned proves they thought it not executed.

Caſe where the want of candour and fairneſs, and not dealing with honeſt methods, occaſioned the court to refuſe enforcing an agreement.

Barebone and *Barnes*, 2 *Chancery Caſes*, 121.

B. poſſeſſed and intereſted in lands for a term of ſixty years, paying 5 *l. per annum*, and indebted and in danger of an arreſt, by articles ſealed, aſſigned his eſtate to the plaintiff for 290 *l.* and his tools and utenſils on the premiſſes, then employed in making brick. Articles dated 16th of *March.*—Proviſo to be *void* if money not *paid* in *five* days. Articles not performed, nor money tendered; but there being no proviſo in the articles for diſcharge of defendant, *Barnes*, for the rent in future, agreed, on advice, that Mr. *Barebone* ſhould purchaſe the inheritance, or procure a *ſufficient* perſon to take the aſſignment from *Barnes*, and *ſecure* him. And to that end fourteen days farther time. *Barebone* treated with the reverſioners, but they would have nothing to ſay to him. However, he *entered*; *when* does not appear, but it ſeemed *within* the fourteen days. *On* the *fourteenth* day

Price,

Price, a hawker, came, and brought 290*l.* no writing was offered or prepared.

One went, treats for the eſtate, but would not diſcover the name of the intended purchaſor, but carried on the treaty as for himſelf; but the articles were filled up with the name of *Barebone*. *Barnes* ſells to *Price* for 290*l.* and on *Barebone*'s bringing a bill to have an aſſignment, it was diſmiſſed.

Though equity will relieve on account of fraud, yet not him who is *particeps criminis*; ſtill leſs him on whoſe ſide the whole of the fraud lies, and againſt an innocent perſon.

Lord Chancellor—Mr. *Ambler*, your client is in poſſeſſion of a decree of the maſter of the rolls. I ſhall always pay great attention to any ſolemn determination of his; and therefore, as I confeſs myſelf ſhaken by the arguments ſo very forcibly urged againſt the decree, I would like to have a little time to recollect the arguments; and I will give you till *Saturday*.

I will throw out a few hints how it ſtrikes me, as a queſtion of equity, not only important to the parties in this cauſe, but as a precedent: Though, probably, it would go on, and then be a precedent.

This is a bill brought for the ſpecific performance of an agreement. Let us firſt ſee whether there be any agreement in writing within the ſtatute of frauds.

It is a wiſe and beneficial ſtatute, and I adopt Lord *Nottingham*'s opinion, that it is ſo wiſe and beneficial to the public that it deſerved a *ſubſidy*, as was the language of thoſe times.

I will adopt the propoſition of Lord *Hardwicke*, that this court can't repeal an act of parliament.

Fraud is a cauſe on which this court would interpoſe to ſet aſide a contract; as in *Scot* and *Langſtaffe*, and many others. I don't mean fraud that would make the party liable to an indictment.

I wiſh you would ſee, notwithſtanding what Mr. *Bacon* has ſo widely laid down, whether there is any *precedent* of the court enforcing execution of an agreement, under circumſtances like this.

Lord Middleton againſt *Wilſon and others.*

1741. Lord *Hardwicke* ſaid he thought the court had already gone *too far*, in taking agreements out of the ſtatute of frauds, and therefore

fore he would never go a *ſtep* farther, unleſs warranted by *authorities.* I wiſh, therefore, Mr. *Ambler* would ſhew me I am warranted by authorities in confirming this decree.

A *letter* has been an agreement; and *any* writing almoſt *may* be an agreement, upon circumſtances.

In the caſe alluded to by my Lord *Hardwicke*, *Marquis of Normanby* and *Duke of Devonſhire*, I took a note of Lord *Hardwicke*'s decree, and had an opportunity of looking into Lord *Hardwicke*'s book, and am glad to find my note agree with it in moſt circumſtances.

Lord *Hardwicke* makes Lord *Somers* ſay, " It is very true that the " court has frequently inforced the execution of an agreement on " notes and letters, as in the caſe upon a memorandum, but it is " where the agreement is *full* and *complete*, and the *time fixed*. If " not *fully* and *completely ſet forth* this court will *not* decree." *Coles* and *Maſters*.

Treaty of Lord *Middleton* with Mr. *Wilſon*. Agreed to give ten years purchaſe for the land. And for the houſe—there were rents upon five cow gates, doubtful whether they were five ſhillings or one. 3600 *l.* and there was an offer on payment of 4000 *l.*

It was upon the letter they principally founded themſelves; the *agreement* appeared, and nothing ſeemed *doubtful* but this *cow gate*. Lord *Hardwicke* decreed that *ſomething* being left behind it is *not ſettled*, and he decided for a ſpecific performance for Mr. *Wilſon*, *againſt* the *prior* purchaſor.

Caſe where execution of an agreement for an eſtate at 3600 l. was refuſed to be decreed on account of a rent left unſettled, and doubtful whether five ſhillings or one.

I ought not, therefore, to go farther than the authorities will warrant me to go. I think this court is not authorized to repeal an act of parliament in this or any other caſe; but they may relieve againſt fraud, becauſe the ſtatute was made againſt it. As when a father charges his ſon with 1000 *l.* for his daughter, the ſon ſays you need not charge, I will pay; he ſhall not avail himſelf of the ſtatute againſt frauds to with-hold payment. Mr. *Baldwin* is not in the circumſtances.

Shew me the ſtatute, ſhew me the *preciſe agreement* which he has a right to demand. Mr. *Popham* has all along acted with the greateſt honour, candour, and fairneſs.

I ſhould be ready to affirm any decree of his Honour's that I could. He has acted with great ability in a court of equity. But if I ſhould be perſuaded I am to decree a ſpecific performance, there is another point; here is a conveyance to be made, on payment of

17000 *l.* The court always effectuates payments as if it was at the inſtant; and this is the reaſon why the court is ſaid not always to conſider *time*, becauſe they can make a compenſation. It is to be conſidered what is to be made.

I ſhould be very ſorry to decree in ſuch a caſe before I had *thoroughly* conſidered, and before every thing had been argued, as well for the appellant as in ſupport of the decree; I therefore give till *Saturday*.

Farther adjourned, on account, I believe, of Mr. *Ambler*'s indiſpoſition, till the firſt day after the firſt ſeal.

5 *December*, 1774. At *Lincoln's Inn*.

Mr. *Ambler*, in ſupport of the decree—It is argued that this decree is wrong, becauſe not warranted by precedents.

Becauſe Lord *Mansfield* named as a party.

It was very proper to make Lord *Mansfield* at firſt a party; very improper afterward: Becauſe it was not known Lord *Mansfield* had made an actual conveyance, and the bill muſt have been diſmiſſed as to him.

Coming too late for a ſpecific performance is objected.

Coming too ſoon is objected; a very inconſiſtent objection. But this could not be when a ſpecific performance had been refuſed; and the objection would have been very ſtrong if the ſpecific performance had not been demanded early.

Objected, that the maſter of the rolls ought not to have decreed a ſpecific performance.

If it had been right to decree a ſpecific performance, yet that a *compenſation* ſhould have been decreed to Mr. *Popham*.

It is ſaid that decreeing a ſpecific performance is *diſcretionary* in the court. Stating properly, I admit it, that it is not a thing of courſe. Diſcretion in common converſation and in a court of juſtice are very different: For if the party makes a proper title, it is no more diſcretionary. In a common ſenſe the court *muſt* do it, which is the legal ſenſe to do whatever they ſhall *diſcern* to be juſt.

Not within the ſtatute of frauds is one objection.

Not complete, another.

Not fair, a third.

It is proper firſt to conſider the true ground of the ſtatute of frauds; and what was the law before; and how this caſe can be affected.

Before the ſtatute *parol* agreements were executed by this court; but to avoid fraud writing was required.

In conformity to the reaſon for which writing was required, equity has formed ſeveral rules.

The court will decree performance of an agreement in writing, though not formally drawn.

1ſt. The court will decree agreements collected from letters. *More* and *Hart*, *Ch. Rep.* 284.

2d. The court will decree performance of an agreement ſigned by *one* only; nothing more common than to ſee a leaſe ſigned by one only, and performance decreed.

3d. The court will decree if agreement *not* put into writing at that time, but agreed to be put into writing.

Leake and *Morris*, 2 *Ch. R.* 135.

1 *Ver.* 151. The bill was to have execution of a parol agreement for a leaſe; the defendant pleaded the ſtatute of frauds; the plea was allowed; but Lord Keeper held, if the plaintiff had laid in his bill that it was part of the agreement, that it ſhould be put into writing it would alter the caſe.

Suppoſe parol agreement confeſſed in anſwer, the court will decree as if in writing.

The ſtatute of frauds was intended to prevent a particular inconvenience; if the agreement is *confeſſed*, the inconvenience can never happen which the ſtatute meant to prevent.

The moment he confeſſes, the agreement is *executed* according to the ſtatute.

Attorney-General *Vez.* *May* 3, 1748—9. for putting an agreement into execution; the ſtatute requires an agreement executed by the party or his agent: Yet where the agreement *appears*, there is no danger of perjury, and it is taken out of the ſtatute. And, in ſuch caſe, I ſhould have no doubt to decree againſt the heir, though I can find no caſe as the reaſon goes throughout.

And ſecondly, his Lordſhip ſays, if the agreement had been in part executed.

2 *Vern.* 455. *Pyke* v. *Williams.*

Wanley and *Sawbridge*, Exchequer *G.* 2.

Plaintiff's huſband deviſes an annuity to his wife of 400*l.* a year, in caſe ſhe ſhould releaſe jointue.

Said by all the court except one, though you ſhould not be compelled to confeſs a promiſe, yet it was neceſſary to confeſs things done to carry *the* promiſe into execution. And if ſuch a confeſſion was required to take it out of the ſtatute of frauds, much more ſhall a voluntary confeſſion be effectual.

Attorney-General and *Ray*, *Liſter* and *Fox*.

Lord Chancellor—Is there any caſe in which there has been a decree founded upon *confeſſion?* [generally without a part performance.] In ſome of the caſes the Chancellor has been mentioned to have ſaid it, but I never found a decree.

Mr. *Ambler* continued—My Lord, I take it as a principle where there is an agreement in writing;

Agreement *confeſſed* by the anſwer;

Agreement in part performed;

That in any one of theſe three caſes the court will decree a ſpecific performance.

That there is an agreement in writing I muſt reſort to this letter.

Letter which Mr. *Popham* admits to contain an offer of 16500*l.*

He wrote under with a pencil not leſs than 17000*l.*

This is not merely enquiring about the price.

By the anſwer which ſays it *concludes* the bargain, it was ſo taken.

All the letters to Lord *Manſfield*; the anſwers; the directions for conveyances; all evidence in *writing*.

Is this in part performed?

In caſe of *Liſter*, tenant began to repair.

Gulter and *Halſey*, there muſt be *ſome* act clear, with a *view* to the performance of the agreement.

What is done here? Settling of the mode of payment; conveyances proffered, certainly with a view to the performance of the agreement.

There is another caſe where plea over-ruled, becauſe not ſaid whether defendant had tendered a conveyance, for this would have been a part performance.

The purchaſer proceeded on his part; ſold out ſtock.

Whether this a certain and complete agreement is to be conſidered.

I will not take leſs than 17000*l*. I will give 17000*l*. Many other things may be added, but more is not neceſſary to make it a certain agreement. The letter, conveyance, draughts—is not all certain? I don't ſee how any of the parties can make a doubt.

The defendant Mr. *Popham* acted upon it as a bargain.

It is objected, performance not to be compelled, becauſe no time fixed for the payment.

If the day had been neceſſary, then no agreement before a maſter would ever have been executed, and the inconvenience is exceeding in fixing a day. Diſputes about intereſt would ariſe; it would be ſaid you have paſſed the day.

Objected, this is not the agreement *originally* made, the agreement was varied; therefore the court will not decree a performance.

Suppoſe it ſufficient as it ſtood originally.

The alteration is for the accommodation of parties, *not material* in its nature, and by the *conſent* of the parties themſelves.

If the agreement had been carried into execution by the parties themſelves or the court, and the 17000*l*. never had been paid to Mr. *Popham*, it was not neceſſary he ſhould diſpoſe of it; it was to

be

be paid to the uſe of the fund, it might have been proper and ſufficient to pay it to the mortgagee, to whom Mr. *Popham* muſt have paid.

Objected, that it is a *conditional* agreement, and condition not performed; and therefore agreement void.

How does this agree with the objection that no day fixed? I know of no caſe but of a creditor accepting a *leſs* ſum on condition of payment at a certain day; there the court will not decree a performance when the day is paſſed.

No day fixed here; but if it had, what was done by the parties?— The delay is allowed.

On account of engagement to pay Lord *Mansfield*, notice given. This is not the fact, and Lord *Mansfield* did *not demand*, and it is not in evidence. Mr. *Popham* has ſuffered very much by the delay, leaſes, improvement of the eſtate.—This, if it be true, is another queſtion.

Next the head of fraud and deceit. If this could have been conducted fraudulently and deceitfully no doubt it ſhould not have availed the perſon guilty of fraud. But I beg permiſſion to aſk whether there has been any fraud or deceit. What is the difference? May not the perſon treated with convey over to the other the next day? The caſe of *Philips* and the Duke of *Buckingham* ſays he may.

If a party were to ſay, I have treated with you as principal, I find you are agent for another, I therefore will not execute; the court would diſmiſs the bill with coſts.

Lord Chancellor—Mr. *Popham* had expreſsly declared, he would not treat with them.

Mr. *Ambler* proceeded—I come to that part.—Where is the fraud, when Mr. *Popham* had ſaid he would not treat *perſonally* with Mr. *Eyre*, that he ſhould treat with him by another perſon?

The only caſe in which a man can be ſaid to act *deceitfully* is, where the purchaſer ſhall not be bound.

The reaſon why Mr. *Popham* refuſed to treat with Mr. *Eyre* was, becauſe Mr. *Eyre* had not the money ready. The money *was* ready. If Mr. *Popham* had not been too haſty, and had waited till the *Tueſday*, he had ſeen it.

The letter written by Mr. *Stokes*, I think, is concluſive of the affair.

"When you treated for 17000*l.* ready money to be paid at
" *Lady-day*, Mr. *Popham* had already refuſed you for a purchaſer.
" Mr. *Popham* therefore will not treat with you, nor any of your
" profeſſion, for the profeſſed purpoſe of ſelling out in parcels, be-
" cauſe he foreſees an inconvenience both to him and Lord *Mans-*
" *field*. However if Mr. *Baldwin* will pay the money within the
" courſe of this week, with intereſt at four *per cent*. from *Lady-day*,
" Mr. *Popham* will be ready to accept it."

Suppoſe he had waited to ſee.

Upon the *Saturday* preceeding he gives the anſwer; if he had waited till the *Tueſday*, he might have made the objection if the money was not ready.

As to the caſes cited, I think, that I ought not to go into them.

I know but of *one* upon which the gentlemen have not much relied, upon which, I beg leave to rely as a caſe in point for Mr. *Eyre*.

Barebone and *Barnes*. This was not the caſe of a ſubſtantial man, but a man worth nothing, and rents reſerved upon the eſtate, which the ſeller would have been liable to pay if the other could not.

Mr. *Garrick*'s caſe. A particular perſon whom the perſon treating with, would not turn out this not in writing, the purchaſer ſaid that he had talked with the perſon and no objection. Here was a direct fraud, not merely a treaty without ſaying for whom, which neither Mr. *Baldwin* nor his agent were obliged to do.

Philips and Duke of *Buckingham*, a caſe which does not apply: For neither one nor the other of the parties allowed the contract. But if the perſon whoſe name was uſed had taken up the caſe, and ſaid that he meant it to be purchaſed in his name, and he would have it the court would have decreed. If Mr. *Eyre* ſays *Baldwin* treated for him, this is the very caſe. The bill is brought in the name of Mr. *Eyre* and Mr. *Baldwin*. If Mr. *Baldwin* declares he will pay he has a right to inſiſt for himſelf.

Next, ſuppoſe the decree of a ſpecific performance whether any, and what compenſation to Mr. *Popham*? I wiſh he would have ſaid what kind of compenſation.

A court has never ſaid, the ſeller ſhall take the rents and profits, and intereſt for his money.

When a man is let into poſſeſſion, he often pays the rent from the laſt pay day, and the court often divides.

It is ſuggeſted the eſtate is greatly improved; lives are dropt; Mr. *Eyre* will be a gainer; Mr. *Popham* ought to have ſomething for the loſs;—no evidence of any great loſs. He pays intereſt to his mortgagee, this is his own fault; he keeps the rents and profits of his eſtate. In what manner or what kind of compenſation ſhall he have.

He ſells at 500*l.* loſs, then how can he gain? He is rather intereſted than Mr. *Eyre* ſhould be purchaſer.

Lord Chancellor—This is a bill brought by *Eyre* and *Baldwin* againſt Mr. *Popham*, in order to prevail on this court to decree a ſpecific performance of the agreement, which it is ſaid Mr. *Popham* has entered into with the plaintiff *Baldwin*, for the ſale of an eſtate for the ſum of 17000*l.*

The firſt queſtion in this caſe will be, what was that agreement which is now prayed to be *ſpecifically* performed. And I was in hopes the council for the plaintiff would have ſtated ſpecially *what* this agreement *was*.

Next, ſuppoſing there *was* ſuch an agreement whether it *ought* to be performed?

As to the firſt, I examined the anſwer and depoſitions; and if there was an agreement it was on the 30th of *June*, that in conſideration of 17000*l.* to be paid 10000*l.* to Lord *Mansfield*, (and which Lord *Mansfield* accepted) and 7000*l.* to be left as a ſecurity upon the eſtate, the defendant ſhould convey to *Eyre*: And they aver on their part, that the deed was tendered to Lord *Mansfield* who accepted.

Equity will not decree upon a bare parol agreement ever ſo clear, not in part performed.

This is not an agreement in *writing* upon the ſtatute of *frauds*; but the queſtion is, whether it is an agreement which *ſo appears* as that the court will *decree* a performance. It has been ſaid that it is a *known* rule in this court that where an agreement appears *confeſſed*, the court will decree a performance, though *no* part has been performed; ſome *dictums* there have been: But Mr. *Ambler* confeſſes that he has found *no* decree.—That where the ſubſtance *clearly* appears though *in parol* without any part performed this court will decree an agreement to be executed. I think it *cannot* be poſſible; this court cannot *repeal* the ſtatute of frauds nor *any* ſtatute. The *King* has no ſuch power by the conſtitution entruſted in *him*; and therefore, there can be no ſuch power in his *delegates*.

The *only* caſe I know that takes a contract out of the ſtatute is of *fraud.* And the juriſdiction of this court is *principally* intended to *prevent* fraud and deceit; where a party has given ground to another to think he *had* a title ſecured, the court will ſecure it to him.

The ground therefore in making or refuſing decrees has been *fraud.* It can never have been laid down by the court that where the *ſubſtance* appears, it ſhall be executed. It would not have been ſo at *common law.*

In reading of *Bracton*, about forty years ago I made a ſelection; of which the following was a part.

De acquirendo rerum dominio, l. 2. cap. 27.

Emptio vero et venditio contrahitur cum de pretio convenerit inter contrahentes; dum tamen a venditore arrarum nomine aliquid receptum fuerit: Quia quod arrarum nomine datum eſt argumentum eſt emptionis et venditionis contractæ. Et in ſcriptura intervenire debeat non erit perfecta emptio et venditio niſi cum fuerit partibus tradita *et abſoluta. Et cum* ARRAE non intervenerint *vel* SCRIPTURA, *nec* TRADITIO *fuerit ſubſequuta,* locus erit pœnitentiæ *et impune recedere poſſunt partes contrahentes a contractu* ſed ſi pretium *ſolutum fuerit vel ejus* PARS, *et traditio ſubſequuta,* perfecta *eſt emptio et venditio;* nec poteſt *poſtea aliquis contrahentium a* contractu reſilire, *prætextu pretii non ſoluti in* parte *vel in toto, ſed agere poterit venditor, ad recuperandum id quod de pretio defuerit, per actionem competentem ſed non ad ipſam rehabendam.*[*]

This court never alters the common-law; but in *particular* circumſtances it extends a *relief,* which the common-law from its *generality* had *not provided.* But for fraud and circumvention there would have been at common-law a relief *ſimilar* to that which courts of equity give, either by *diſſolving* or *affirming* the contract as the *conſcience* of the caſe requires; for at common-law a man ſhould not take advantage of his own wrong. And common-law would have given the party *injured* by ſuch contract *damages* at leaſt; equity *reſtores* him to that ſtate in which he would have been if no unfair practices had been uſed. Common-law in many inſtances conſiders a fraudulent contract abſolutely *void;* except as againſt the author of the fraud, or thoſe who knowingly contributed to it: But as againſt ſuch perſons valid. And equity in this court has peculiar means and rules for the purpoſe of this relief, and to guide the court in extending or withholding it.

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[*] Theſe *leading* rules, which prevail ſtill, were therefore received and in *ſettled* practice, as it is reaſonable to collect from hence in the reign of *Hen.* 3. more than five hundred years ago; and the ſtatute of frauds four hundred years after the times of *Bracton*, did, as to this part of it, little more than declare them.

Let us ſee how far the court has gone—where there has been a contract *clear* though not in writing, yet if afterwards the party has *refuſed* to execute, *there* if any fraud the court have not permitted the refuſal, where the agreement has been *very explicit*, and the other party has *acted* upon the faith of it.

Lord *Somers* is ſaid, in the note I have out of Lord *Hardwicke*'s note-book, to have expreſſed himſelf thus.

Lord *Hardwicke* ſtated the caſe of the Marquis of *Normanby*, and then cited Lord *Somers*. "It is true the court has frequently "and juſtly interpoſed for the execution of an agreement, though "the agreement only contained in a letter. As in the caſe of *M.* "and *Hart* where the plaintiff had *married* upon the credit of it. "So where the agreement is *confeſſed* upon the defendant's anſwer, "but ſuch anſwer muſt contain the *full* and *complete* agreement; "for if any thing remains unſettled, the court will *refuſe* as in the "caſe of *Coke* and *Maſters*, before Lord *Jefferies*."

Lord *Somers* ſeemed therefore to think upon the caſe of *M.* and *Hunt*, that there muſt be ſomething *done*. The plaintiff had *married* upon the credit of it. In the caſe of the Marquis of *Normanby*, *part* of the money had been *paid*. Is this agreement complete and proved? And is it *ſuch*, upon the circumſtances, that the court will *execute* it? Suppoſe there had been an agreement to pay the money, and on the other to receive; but the time did not appear. (Which is always *material*, but particularly in the caſe of a mortgagor, where the mortgagee takes four *per cent.* and was to take five if not paid) This is *ſo material* that Mr. *Ambler* admits, if Mr. *Popham* had waited till *Tueſday* and not been paid, he would have had a *right* to refuſe.

What performance then? If the defendant paid to Lord *Mansfield* 10000*l.* upon the 30th of *June*, he would execute the conveyance, and take the ſecurity for the reſt. No money upon the 30th of *June*.

Mr. *Baldwin*'s agent writes, that he is ſurprized the treaty does not go on; but it is *very well*, as Mr. *Baldwin* is on the eve of a purchaſe which may be *more advantageous*. And that Mr. *Stokes* muſt be apprized of the ſcarcity and value of money. After, all if Mr. *Stokes* and he ſhould agree, he will be at the Crown and Anchor. No treaty ſettled *then*, only that it was very well; if they ſhould conclude, he ſhould be at the Crown and Anchor. Mr. *Popham* writes he wont take leſs than 17000*l.* perhaps then he *will* take 17000*l.* if you will pay on a *day* mentioned; and ſome time after Mr. *Baldwin* writes back that he will give 17000*l.* "which "*concludes* the bargain." Was this ſufficient? No *day.* Was it an agreement *complete?* The diſtinction in the caſe of *Gulter* and *Halſey* was in this very different.

Does Mr. *F.* the agent for the plaintiffs, conſider it as an agreement, though he ſays, it *concludes* the bargain? He wants a *line* for his *ſatisfaction.*

An *abſtract* delivered; what is this? Only evidence of a *treaty* in contemplation which *might* come to be *executed.*

The terms are *altered* the 13th of *May*; application to Lord *Mansfield.* Lord *Mansfield* approves. Mr. *Stokes* hopes Mr. *Baldwin*'s money will be ready in *ten* days; agrees to wait.

17th of *June*, Lord *Mansfield*'s agent writes, his Lordſhip has appointed *Monday* at five in the afternoon to execute, as Mr. *Stokes* fixed upon that day; Mr. *Popham* writes, that he hopes Mr. *Baldwin* will be punctual, as he has ſo often been diſappointed, and that he ſhall think himſelf at liberty, and obliged to treat with another purchaſer, if the money be not paid by *Monday* next. Here then Mr. *Popham* was bound to the *Monday.*

However they are not ready on the 28th of *June.* And it is ſaid for the plaintiffs that the deeds were neceſſary to be *tranſcribed,* and on or about the 30th of *June* was appointed for executing the conveyance. Appointed; by whom? I ſuppoſe by thoſe who thought it beſt the conveyance ſhould be re-ingroſſed; and this was ſo material, that Mr. *Ambler* confeſſes, if they had not paid on the 30th of *June,* this would have been ſufficient to have put it off.

Mr. *Stokes* writes—As Mr. *Popham* agreed to defer for your accommodation, if the money be not paid immediately, Mr. *Popham* will take ſuch meaſures as he ſhall be adviſed.

Mr. *Ambler,* though he admits Mr. *Popham* would have been at liberty, if payment were not made on the 30th of *June,* yet in another place ſays the time of payment is not material; it was very material when five *per cent.* intereſt was to be paid if the mortgage not diſcharged. It is *always material.*

The 22d of *June* is the *laſt* day that appears. But ſomething *afterwards* was done. They went and cauſed the conveyance to be re-ingroſſed. Mr. *Stokes,* the perſon who engroſſed for the plaintiffs, has done what I am ſorry to ſay all the parties applying for a ſpecific agreement and their agents have done, endeavoured to *impoſe* upon the court. One would underſtand that the engroſſment was offered with the name of *Eyre* inſtead of *Baldwin.* It cannot be; becauſe the very purpoſe of the re-ingroſſment was to change the names, and put *Eyre inſtead* of *Baldwin.* It is denied by *Stokes*, and not ſworn by *S*.

He ſays that, according to the beſt of his remembrance and belief, the deeds were ready the 21ſt of *June* for execution by Mr. *Popham*, who wanted to go out of town directly. And the deeds were re-ingroſſed for the purpoſe of putting in *Eyre*'s name inſtead of *B.* and there were ſeveral blanks in the ſaid re-ingroſſments.

Mr. *Stokes* helped to fill up the blanks in the re-ingroſſments with the name of the ſaid *F. Eyre*, inſtead of *Baldwin.* As I read it you would think it was, helped to fill up the blanks with the name; but it is to be read, helped to fill up the blanks of date and ſums in the re-ingroſſments; which re-ingroſſments had the name of *Eyre* inſtead of *B.* (that is) *afterwards* inſerted. It is not poſſible, in the ſenſe in which it was meant to be taken; if it had they ſhould have produced the re-ingroſſments, and ſhewn that Mr. *Stokes* was capable of ſwearing to deny his *own* hand.

It is a moſt *ſcandalous* effort to impoſe upon the court.

Mr. *Eyre*'s clerk ſwears in the ſame manner.

Mr. *Eyre* ſwears he has 4000*l.* in his banker's hands, *excluſive* of 3000*l.* The proper manner would have been, if this could have been ſworn, to ſay that he had 7000*l.* in the banker's hands; but it does not appear where the 3000*l.* were. It cannot be in his banker's hands, becauſe the notes in his own hands were certainly not with his banker. And he adds, and of bills and notes in his own poſſeſſion.

And this is very material, with regard to what I ſhall add. I ſaid they were all in the ſame *evaſive* manner. The agent for the plaintiffs ſwears he had inſtructions from the complainants, or *one* of them, to treat for the purchaſe. He might never have a ſingle inſtruction from *Baldwin*, and yet this be true.

Excluſive of 3000*l.* the product of ſtock ſold out—this money was *borrowed*, and it was not his own. And yet who would not have taken, from the ſwearing, that it *was* his own?

But the *material* thing is, the 30th of *June* was *not* the day agreed between the parties; the 22d of *June* was the laſt day.

What are the *circumſtances*, from beginning to end, to make a court of equity *compel* an agreement, upon conſiderations of equity *not within* the *ſtatute*?

What are offered are theſe. *Part performed*, becauſe the *abſtract* was delivered, *conveyances* drawn, and money *borrowed*. This was never the meaning; it is where the party does ſomething *as owner*.

Mr. *Popham*, very much indebted, wants to ſell his eſtate, in order to leſſen his debt. Lord *Mansfield* agrees to take as much as this eſtate will ſell for, in order to leſſen the debt. *Eyre* propoſed; *Stokes* writes. *Eyre* ſays he has not ready money ſufficient. This will not anſwer Mr. *Popham*'s purpoſe; he will have nothing to do with him. Then he acts *behind the curtain*: He treats in Mr. *Baldwin*'s name. There is an *evaſion*. This agent ſaid he had orders from the complainants, or one of them, it might be from *Eyre*. And he makes *Baldwin* write a letter. Is this generous?

But it goes farther, the agent for the plaintiff, writes a letter.

He goes away to Mr. *Popham* (I can't help uſing an *hard* expreſſion) in order to *draw him in*. He carries the letter; he furniſhes the pencil; *Popham* ſays I will not take *leſs* than 17000 *l.* He then writes back that Mr. *Baldwin* will give that price; ſo now the bargain is *concluded*. A *ſhort* concluſion.

" But pray, Sir, for my ſake, only write a *line*." No circumvention, no deſign, to enable counſel to ſay it's in writing, it's an agreement within the ſtatute.

Two days after the agent goes, with a writing ready ſigned, and proffers it. Mr. *Popham* ſays, " I will do nothing till I ſee Mr. *Stokes*." Was this fair? A country gentleman, unacquainted with law, to get him to ſign by himſelf, in the abſence of his attorney, a writing with no ſpecified time of payment? Is it candour to entitle to a relief in a court of equity? However, Mr. *Popham* wanted his money; he ſends his abſtract; the time is put off, not by Mr. *Popham*. On the fourth of *March* the money to be paid; on the 25th of *March not* paid; then they enter into a *new* bargain. Now, therefore, it was all in *treaty*: And *this* was that the money ſhould be paid 22d of *June*, 10,000 *l.* to Lord *Mansfield*.

Deed carried to Mr. *Stokes*, with the names, that is as already explained. After this Mr. *Popham* ſees it; he is thunderſtruck to diſcover he has been treating all the while with Mr. *Eyre*, in the name of *Baldwin*.

Has Mr. *Popham* been guilty of any fraud or circumvention? Has he not ſuffered moſt materially, by paying intereſt at five *per cent.* from the 25th of *March*? Was he not *forced* to ſell, with 500 *l.* loſs?

The bill was brought immediately, but it was diſmiſſed two or three times, and made as late as it could, by the delay of the plaintiffs. And this is *extremely material*, when a *ſpecific* agreement is inſiſted on, and the party to be *compelled* to ſuffer all the while for the delay.

It is *incredible* what Mr. *Popham* muſt ſuffer; he muſt pay *all* the money back, with *intereſt*. On the part of the purchaſors he has *engaged* with them, and *bound* himſelf to pay back, and given ſecurity, and he muſt pay five *per cent*. from 1767, to the mortgagee.

I am ſorry to have ſaid ſo much. The maſter, I have no doubt, thought himſelf bound by the rules: There can be no other reaſon. I ſee the rules in another light. And the court has never *compelled* an agreement but upon the caſe of fraud, to take it out of the ſtatute of frauds, where *no part has been performed*; unleſs it has been clearly proved in writing ſubſequent, either by anſwer or otherwiſe.

But here the moſt material part has not been proved, which is the *time*; which is *neceſſary* to be proved whenever the parol agreement is to be executed.

The next material thing, that he had the money *ready*, is *not* proved; but the *reverſe* is proved. There is no fraud in the defendant; nor is it ſuch an agreement, taking this as proved, which the court would execute.

I am, therefore, of opinion, that the decree of the *maſter* ought to be reverſed.

My only doubt—indeed the only heſitation that I have, is upon the manner of ſwearing to the filling up the blanks; the ſwearing to the money, and the other *evaſive* circumſtances, whether I ought not to *reverſe* with *coſts*.

The only reaſon that induces me not to do it is this, I ſhould be very ſorry to add coſts which could not afterwards be diſcharged, where they have had a decree.

If it had regularly come before me I would have diſmiſſed it with *coſts*: And, as I differ from the maſter, I wiſh they may appeal; becauſe I think there is a judicature which *can* diſmiſs it with *coſts*.

BILL DISMISSED.

PRÆFATIO

PRÆFATIO.

INTER has tempeſtates, atque turbines quibus reſpublica noſtra jam diu jactatur, nullum adeo mali ſolatium præſentius invenio, quam ut vitali quodam genio conditam credam: Et id ſane, non tantum ob diuturnitatem acti jam imperii, neque vim et robur populi, neque inſulæ ipſius molem fere inexpugnabilem et hoſtibus inacceſſam; ſed ob alia majora; religionem nempe, et leges; et principia, ejus formamque veterem.

Nam diuturnitas per ſe enimvero, bene conſtitutam compagem, felicem ſortem, auſpicatum cœlum affuiſſe plerumque monſtrat; et venerationem et dignitatem quandam præfert: Sed in humanis rebus tantum abeſt futuram incolumitatem ſpondeat ut imminentem interitum verius inde ominemur. Cernimus quotidie ſaxa ingentia vetuſtate ſublapſa ſilvarum immenſas umbras arborumque reginam quercum, autæ vi aut humanis manibus concidiſſe: Urbes ſubrutas; terram ſubinde labefactatam: Flumina exarnerunt; mare ipſum ac ſidera communem ſortem patiuntur. Naſci nova, vetera interire, mutari omnia. Animantia autem omnia ſi his conferantur immaniſſimas etiam beſtias et ponti monſtra, imbecilla, caduca, infinitis caſibus obnoxia: Ac quamvis minutis maxima interire. Nos vero, miſerum ac incertiſſimum, inter incerta omnia, humanum genus qui bellis concertamus, qui æterna molimur, ita vivimus ut quod longiſſimum vitæ noſtræ ſpatium concedatur, centeſimus ferme annus, (et quoti hactenus) alii voluptatibus, alii ambitione, plurimi inertia, innumeri ſeriis nugis, at tamen nugis, conteramus. Ita fluxo corpore et labili inter cœli, ponti, terræ diſcordia elementa, inter animantium inſidias et ferociam aliorum, vel quod maximum et teterrimum, inter propria humanitatis vitia conſtituti, et interea vel tegulæ lapſu, vel vermiculi morſu, vel pulviſculo illapſo ſpiramentis animæ intercluſis tam nullo negotio confecti, ut in dieculam ſi liceat perdurare prope inſtar habendum ſit æternitatis.

Militum igitur robur et ducis maximi vis intra pauciſſimos annos, ne dicam puncto temporis, quo recidant non ignaros alloquor. Homines enim alloquor: Neque ullum clarius aut majus mutationem terreſtrium fragiliſque ſpei pignus quam ſi memineris hominem te eſſe; verbo omnia incerta concluſa eſſe videantur.

Romam igitur concidiſſe ita non mirer ut potius ſtupeam, tam vaſtam, et ad extrema ſubitam potentiæ molem, ubi eo uſque excreviſſet ſtare potuiſſe. Perſidos, Germaniæ, Galliarum, res non attonitum eum habebunt, neque in tanta inſtabilitate partim fuiſſe nec tam ſæpe non concuſſas modo, ſed ſubverſas, non immutata imperia, ſed ſedibus et radicibus convulſa alio ceſſiſſe ſi cogitet hominum illud robur fuiſſe; et plerumque unius homuncioli humeris niſum. Urbes commercio ampliſſimo quondam inſignes, Tyron, Sidona, Athenas, Corinthos, Carthaginem, mundi olim quædam emporia, video alias partium ſtudio, alias dominandi aviditate, plurimas maximaſque luxu, ſocordia, deorum hominumque contemptu, ex nimiis opibus et magnitudine orto, ita evanuiſſe ut veſtigia ipſa ægre requiràs, et ſæpe ne id quidem.

Propugnacula vero, arces, commeatus, claſſes, non vis et fortitudo ſunt, ſed fortium tantum et bonorum inſtrumenta: Et adeo non in omnia ſecura ut ſæpe tutius fuerit ſpreta ea, quam credita. Alia igitur quærenda externis magis certa, humanis viribus magis duratura: Quæ ſane non alia uſquam videre videor, præter rerum divinarum cultum, et bene conditum, atque conſtitutum, reipublicæ ſtatum.

De religione non hujus eſt inſtituti multa dicere: Talem vero habemus iis probationibus fundatam, iis ad vitam moreſque preceptis, exemplis, auctoritate, ea denique ad civis inſtruendos optimis artibus, ad rempublicam conſervandam, ad generis humani pacem et utilitatem, ea pulchritudine eâ ſpe, ut ſatis pro dignitate explicare ejus nimirem ſit qui condiderit *Dei*. Leges vero et reipublicæ ſtatum ab eodem Deo, per ſapientiam optimorum virorum, tot ſeculorum curſu, tot exemplis, tot demum etiam caſibus indita, firmata, defenſa, aucta, tanta hæc et tam præclara, tam noſtræ reipublicæ propria, mira quadam tum Dei providentia, tum majorum noſtrorum conſilio, virtute, diligentia, fide, deducta, et nobis tradita, ſancita, commiſſa video.

Vix aliam rempublicam aliumve imperii ſtatum inveneris, tam diuturnæ pulchritudinis, tam non imminuti roboris, tam non mutatæ formæ, tam ejuſdem ab antiquo ingenii: Ita apte diſtributis partibus; tam præclare proviſis legibus; tantæ auctoritatis, clementiæ, æquitatis. Ea juſtitiâ, ea in publicam utilitate, in privatos temperantiâ, opinor, nullum. Ut conſtitutio hæc noſtra non jam Angliæ, ſed libertatis; non hominum ſed ſapientiæ nomen, non legum alicujus civitatis, ſed ipſius juſtitiæ exemplar, et quædam divinæ pulchritudinis quaſi retecta facies habeatur.

Mitto multas paſſim conſuetudines ab intimâ. Vetuſtate ante conſpectas Romanas Aquilas, pulſum que Cæſarem nobis cognitas, neque adhuc vi temporis aut rerum continuo orbe exeſas vel dejectas, atque obtritas. Hæreditatum dico; dotis amarito in uxorem (quod contra Romæ et Athenis factitatum) aliaque ejus generis; quorum conſtantiam tempus, prudentiam uſus comprobavit. Mitto quod ſupplicia illa fœda, equleleos, cruces, ardentas laminas, et prodigia cætera crudelitatis et ſtultitiæ humanæ neque leges noſtræ agnoſcant, neque unquam fere agnoverint: Si druidas forte excipias, et Romæ illius tyrannidem a cervicibus noſtris, ægre, at fortiſſime, depulſam. Ejus inquam Romæ quæ veterem ſuperbiâ pravoque cultu ſuperavit; et utinam meliora ejus aſſecuta eſſet. Præterea pauciſſima, quæ non legum, ſed temporum monumenta memoria rerum noſtrarum detulit. Statim enim fere ac pullulare incepiſſent denata ſunt, vel per domita.

Quinimo non modo nocentes meminimus ſaltem homines eſſe cujuſcunque gentis fuerint; etiam illud majus nefas vix per bis mille annos fere apud nos extitiſſe repertum eſt, crimina per tormenta eliciendi, ut pœna judicium ante cedat et minore ſupplicio aperte noxius quam innocentia et fortitudo viri plectatur falſo crimini inter ignes tortoreſque renitentis; habemus et hoc noſtrum, hoc vere noſtrum *judicium parium!* judices ex ipſius rei aſſenſu lectos, domicilio vicinos, conditione proximos, ipſos inter ſe, ac reo, *pares*.

Horum non niſi unanimi conſenſu, de capite civis Anglicani, de exiſtimatione vel fortunis ullum erat aliquando judicium. Et jam non adeo intercidit pulcherrimum inſtitutum, quin ad hoc quaſi præſidium libertatis columen juſtitiæ, aram innocentiæ ſapientiæ que oraculum, maxima fere quotidie deducantur. Habemus *magnum conciliam* illud *ſenatus populique Anglicani* vetuſtate ante omnium monumentorum fidem; quæ antiquiſſima tamen ei ſuffragantur. Hinc Areopagum, hinc curiam Romanam, inde Spartanam Democratiam conferes; non modo diviſas ſuperamus, etiam conjunctas vincimus. Tum vero etiam illud cogitandum: Romam nunc reges, deinde conſules, poſt tribunos, dictatores, imperatores denique rexiſſe. Tanta ſubinde viciſſitudo, ea calamitas, ea moles in ſe ruentis imperii dominam gentium Romam concuſſit, afflixit, ſolo demum æquavit. Athenas optimi cujuſque nomine paucos opibus fretos ita rempublicam habuiſſe, ut non *magiſtratus*, ſed *domini* viderentur: Penes populum ſæpe numero ſpecie fuiſſe poteſtatem, ſummam re vero apud *plebem rapacem, credulum, indocilem ſævum*; vel ſui ipſius motibus vel flatu oratorum jactatam, tumultuantemque. Spartæ vero virtutes, fere omnes eo induratas, ut in *vitia* pervenerint; et ne quid alieni cuperetur, ne illa quidem propria fuiſſe, quæ natura maxime voluiſſet: Conjugia et patrium nomen. Ut potius diverſa ſervitutis genera, diverſa vitia, pravæque rerum publicarum ſpecies, quam uſquam vera reſpublica eſſe videretur.

Recentiora et hodierna intuenti quam paucæ mentem incurrunt vere rerum publicarum et libertatis effigies. Magna orbis pars ſub tyrannide confeſſâ et aperta ſqualet, quibus pro libertate eſt *bona ſervitus*, et ſumma felicitas *debere* non *pati infortunium*, *ſuiſque* ex conceſſo tanquam *alienis*, et quantum vis precario uti. Conjunctam rempublicam ſeptem provinciarum ex pluribus Hiſpanienſi jugo pene infra patrum memoriam ereptam, quo nunc redactam! Ubi jura leges, libertas prior! Venetum ſenatum an Genuenſem adeamus libertatem quæſiturum! Etiam parvulæ, at nobiles iſtæ reſpublicæ (non enim mole ſed *intus* virtutem verumque pretium metimur) neſcio quo evaſerint Luccenſis, et Marinenſium antiquiſſimae. Ultra Pyrenaeos an ſit ſcandendum, lacuſre Lemanus viſendus, ſi forte deliciæ generis humani et amor cœli, libertas, etiam num illic habitet? Fruſtra ſcrutamur extra: Nos ſuos alumnos, Britanniam *ſuam*, *ultimos que* noſtri imperii *fines Libertas* eſſe *voluit* ac *juſſit*, *ſuos*.

Et mihi quidem cogitanti non ſine divino ope, et ſingulari quodam favore, maximis que majorum in publicum meritis fieri potuiſſe animo ſedet, ut quam rempublicam ætas noſtra vidit, orbiſque obſtupuit virique fere omnium gentium *ſapientiſſimi* in cœlum laudibus et nuper et olim extulerint ullam tam diu habuiſſemus. Regiam poteſtatem pulchre *ornatam*, tam *legibus exſequendis* proviſam, tam imperio *tuendo* armatam, tam provide, et ſibi non minus quam publico, utiliter, *circumſcriptam!* optimatum auctoritatem, populi vim, univerſæ reipublica *Majeſtatem*, hæc adeo velut cœleſti artificio apta atque librata. Leges vero ipſas tam graves, tam antiquas, æquas, *omnium conſenſu factas* atque comprobatas: Judicia eo uſque *ſancta* a *vi*, *metu*, *odio*, *amore*, *dolo*, *errore* etiam, quantum in humanis licere videatur, clauſa et circumſepta: Eadem, in auxilium omnia, aperta; eadem quæ habenda quæque patienda cuique eſſent, non ex *ſuo arbitrio*, ſed ex legibus definiſſe, *quæ eadem voce omnibus loquerentur ſemper*. Dei cultum ſimplicem in pleriſque purum optimum intreamur: Non coactum immanibus inſtitutis, atque ſupplicio; non præſtigiis jactitatum, non in caligine ac ſordibus latentem, non legum auxilio in perniciem hominum irruentem, ſed legibus ſociatam.

Religionem caſtam, moderatam, gravem, libertatis fautricem, pacis amantem; benevolentiæ, juſtitiæ, *bene parendi et recte imperandi*, *magiſtram*. Hujus ævi ducem et ſolamen; et æternitatis portas reſerantem. Quæcunque Deo accepta, hominibus chara, publice honeſta privatim bona, univerſis utilia eſſe cenſeantur, ea prope omnia mea ſane ſententia (neque mea tantum, ſed optimis judiciis, et conſenſuæ maximo) leges videntur Anglicanæ amare atque complecti. Ea hæreditas nobis a majoribus non augenda (ſatis enim magna atque ampla eſt) ſed retinenda, atque ſanctiſſime tradenda poſteris, ut a patribus accepimus, devenit.

Longum eſſet, et prope infinitum neque mei ingenii vel ſcientiæ, *omnes* leges Anglicanas recenſere; et multi modam illam variamque ſapientiam vel mirari ſatis nedum enarrare queam. Sed ſi cujus unquam juriſconſulti domus, tanquam Scævolæ illius, civibus unquam patuiſſet ubi adiretur, ubitanquam ad delphicam ſedem confluerent homines, " ſuarum rerum incerti quos ille ope ſua ex incertis certis

" compoteſque conſili dimittat, ut ne res temere tractent turbidas. Quam id in legibus noſtris aptum, proprium, et veriſſime dictum videatur. Quæ enim unquam leges humanæ tam caſtæ, tam gravitatis plenæ, tanta auctoritate extiterunt ac *olim* noſtræ. Quæ tam lites, calumnias, vim, dolos, *ambitum*, cæteraſque reipublicæ peſtes oderint ac vetarint omnino neſcio: Et diu ſane his omnibus reſtiterunt; neque adhuc non reſiſtunt.

Et olim ſane ſapientum domus, juriſprudentiæ hoſpitia atque ſcholas, nobilium juvenum cœtus ſtipaſſe non miraculo nobis ſed rubori fortaſſe, cum jam aliquando deſierit, eſſe debeat. Nempe ex illo uberrimo fonte inſtituta patria, mores, diſciplinam, parere legibus conſtitutis et novas ſi qua opus eſſet, ferre, ſi patria ad id ſummum munus capeſſendum juſſiſſet, *ſimul* diſcebant. Seniores venerari, magiſtratus colere; *libertatem* et *vere* ſcire et incorrupto amare, et fortiter retinere. Neque uſquam fere in veteri noſtrâ republicâ major modeſtia quam in poteſtate ſumma neque major potentium in humiles amor, tenuiorum in optimatis obſervantia ex veteribus inſtitutis et ex *publico bono* reperietur. *Corrumpere* vero ac *corrumpi* maximis imperiis ſemper exitioſa, adeo tum ſæculo aliena, ut legum-latores præterirent: Credo ne non tam caviſſe quam *monuiſſe* viderentur ferme enim ſexcentis a Gulielmo primo annis ad Elizabetham reginam neminem ambitus damnatum conperio, et multo difficilius invenires qui ſumma in republica munia ſummamque poteſtatem delatam vellent accipere quam qui æquo animo privati degerent. Nunc, quoniam pleraque obſolevere, ſaltem elementa quædam et principia legum, uſu atque auctoritate *maxima* vere dicta ſtatui referre; et etiam *placita* quædam et legis et æquitatis *regulas* eaque ut plurimum non *probare* (per ſe *enim* probant non probantur) ſed adjunctis tum noſtri ſæculi tum priorum exemplis illuſtrare, et quam fuerint in judiciis agnita, et quanti ponderis fructuſque ſint experimentis allatis (quæ maxima rerum bonarum laus) oſtendere ſed hæc ſi vita longior et propitius annuerit Deus nunc tantum ipſa per ſe utcumque collecta, faſciculum neque magnum neque forte per otium verſanti (otium enim noſtratibus non in inertia ſed in mitiore ſtudio poſitum reor) omno inutile quo autem propoſito et conſilio hoc qualecunque aggreſſus ſim breviter liceat aperire. Videor palam facturus, quanquam id neminem fere latere attentiorem arbitror jus noſtrum non recens natum ſed inacceſſæ vetuſtatis, non temere congeſtum ſed pulcherrime ordinatum, non calliditate quadam ac minutula ſolertia ſed *ſumma prudentia* conſtare et ex intimis naturæ ac veritatis fontibus hauſtum, denique, quod pleroſque forte lateat non *chartis* traditum aut in ſtatutis præcipue ſitum; non forte, non vi aut dolo fictum, ſed maxima ex parte ex *jure naturali* pendere, ex ſinu *libertatis* fluxiſſe, *juſtitiæ adytis adoleviſſe*: Publice comprobatum, ingenuum, ſpiritus verique ut ita dicam, ſanguinis et ſucci plenum, in ſe compoſitum teres, rotundum. De lege autem Angliæ *communi* non jactanter neque falſo dictum eam eſſe *ſummam rationem* quod, niſi qui *principia* ejus obliti ſunt facile confitentur.

Illud vero vereor ut ſim probaturus quod Anglus Anglos, de laudibus legum Angliæ dicturus, latio ſermone (illoque forte barbariæ quam vero latio propiori) alloquar. Ejus vero, ſive conſilii ſive temeritatis noſtræ, habeo auctores maximos, antiquos, noſtros cives, ſumma legum lumina, qui idem aliquando fecerint: Quos citando metuo ne potius arroganter defendere quam ſtulte cepiſſe conſilium arguar. Deinde, quod propius attinet, *maxima* ea ipſa et *regulas*, latio ore plerumque invenias locutas, idque arbitror non ſine gravibus cauſis a ſapientiſſimis viris factitatum. Primum ut ne temere prolata ſed *enunciata* graviter eſſent et *infixa* mentibus hærerent: alterum ut quaſi toga Romanæ inditis inſignibus non intra linguæ noſtræ limites et imperii, olim ſane anguſtis tenerentur, ſed ut cives Romani olim, ubicunque terrarum incidiſſent *civitatem* reperirent et *domi* eſſent. Maxime autem ut perenni memoriæ pro dignitate ipſorum mandarentur. *Veterem* enim linguam illam, que non ita proprie *Gallica* eſt dicta jam diu faſtidimus, qua legum monumenta vetuſtate ampliſſima, uſu et auctoritate *ſumma* continentur, et id *ſolum* ex omnibus quæ aliquid *Gallici* ſapere videantur inter ineptias et quisquilias cenſemus. Anglicana autem lingua non tantum ab uſu quotidiano remotiorem ſed vulgarem et communem qua ternis quatuorve adhinc ſæculis omnes utebantur, non modo alia jam eſt ſed prope omnium ubique gentium minime nobis cognita. Romanam vero doctiſſimi et prudentiſſimi viri prævidebant, cum *latiſſime pertinere* tum *minime* humanis vicibus *obnoxium*, eâque ſe *breviter*, *plane*, *graviter*, quæ vellent poſſe eloqui et quaſi quibuſdam cancellis ſeptam ſapientiam (non invidia ſed ne uſu obſoleſceret atque dilaberetur) continere. Neque tam elegantiæ quam veritatis ſtudioſi neque *amari* ac *ſuſpici* verba quam *mentem intelligi* pluris æſtimantes, quæ *propriis* vocabulis Latinis *deſtituta* eſſent non magis veriti ſunt *ſuis* eferre quam diſertiſſimus illæ Tullius Græca uſurpare ubi Romana ſatis commoda deeſſent.

Ea *maxima* ſive *principia* vis ſive *aximata* igitur quæ lingua Latina tradita ſunt, aliâ vulgare niſi illa prius retuliſſem *religio* mihi fuit, neque præfari lectorem aliter volui quam ac ipſa conſcripta ſunt ac indevenere. Pauca quædam de meo addidi longe fateor auctoritate inferiora: ſed tamen e ſapientium juriſconſultorum noſtratum arbitror ducta libris et judiciis firmata.

Exempla ipſa *Anglice* afferre alio libro jam paro modo fautricem habeam ſapientium prudentiam: Et ſi aliquid juventuti idem iter capeſſenti commodi allaturum liceat ſperare. Eaque prope eiſdem verbis ac memoriæ mandata ſunt ab iis, graviſſimis plerumque viris, qui in libros retulerunt: tantum, pro ratione inſtituti hujus, *ſuccinctius*.

Totum hoc opuſculum boni conſulas oro non mei cauſa ſed legum quas amore ſaltem ſi minus ingenio ac ſcientia complectar quæ tecum, bone lector, hic ipſa colloquentur. Mihi, aliquid attuliſſe præſidii vel etiam lucis vel denique *ornatus* legibus noſtris optimis, et clariſſimis inſtar ſummi muneris ac præmii fuerit: Voluiſſe et conatum eſſe, utcunque res evenerit, certe non parum.

G.R III.
BRITISH MUSEUM

Maxims and Rules
OF THE
LAW OF ENGLAND,
AND
PRINCIPLES OF EQUITY;

Which may be found in the Inſtitutes and various Reports, in Bacon's Law Tracts, and in the Book called the Grounds of the Law, or appear ſounded in ſelf-evident Deductions of Reaſon.

1. SALUS POPULI SUPREMA LEX ESTO.

2. DEUM ESSE ex conſenſu omnium communis orta lex in legibus Angliæ plurimum valet.

3. Religio Chriſtiana pars eſt legis Angliæ communis.

4. Populus Anglicanus nemini ſervire aut conſuevit aut debuit niſi Deo et legibus.

5. Nemo poteſt niſi quod de jure poteſt.

6. Rex præſumitur omnes leges regni tenere in ſcrinio pectoris ſui.

7. Prerogativa eſt jus regis bonum & antiquum in decus & tutamen regni ſecundum bonas & antiquas populi libertates & legis Anglicani leges & conſuetudines.

8. Lex facit regem.

9. Rex non eſt ubi voluntas dominatur.

10. Ignorantia legum neminem excuſat, omnes enim præſumuntur eas noſſe quibus omnes conſentiant.

11. Non eſt lex ſed ſervitus ad teneri quibus non conſenſeris.

12. Lex communis Angliæ ita regis prerogativam admetita eſt & circumſcripſit ut ne hæreditatem alicujus tollat lædatve.

13. Nullum tempus occurrit regi: Rex nunquam moritur.

14. Rex nil aliud eſt quam lex agens.

15. Proprium eſt regis gratiam delicti facere.

16. Non poteſt rex gratiam facere cum injuria alterius.

17. Populus Anglicanus non niſi ſuis legibus quas ipſe elegerit tenetur obtemperare.

18 Miſera eſt ſervitus ubi jus eſt vagum aut incognitum.

19 Poteſtas regia eſt facere juſtitiam.

20. Rex nil poteſt jubere niſi per curiam legitime conſtitutam.

21. Rex non poteſt malum vel injuriam facere.

22. Regis Curia & Curia Populi Anglicani ſive Parliamentum non ex ſcripto ſed ex communi lege ſunt.

23. Rex nunquam infra ætatem eſt.
Rex ad juſtitiam faciendam non cogitur.

24. Dominus omnium in regno terrarum rex habendus & ab eo omnes tenent ita tamen ut *ſuum cuique* ſit.

25 Tenens domino fidem præſtare & debita ſervitia tenetur & dominus invicem tenenti protectionem & jura ſua omnia.

26. Non minus ſunt turpia principi multa ſupplicia quam medico multa funera.

27. Qui parcit nocentibus innocentibus minatur.

28. Lex Angliæ eſt lex miſericordiæ.

29. Nemo poteſt contra recordum verificare per patriam.

30. Allegans contraria non eſt audiendus.

31. Turpes tribunalibus arceantur.

32. Res judicata pro veritate accipitur.

33. Diſcretio eſt per legem diſcernere quid ſit juſtum.

34. Quiſque præſumitur optime in ſua cauſa dicere.

35. Certa res oportet in judicium deducatur.

36. Nullum damnum ſine remedio.

37. Actio non facit reum niſi mens ſit rea.

38. Vigilanti non dormienti jura ſubveniunt.

39. Affectio tua nomen imponit operi tuo.

40. Nemo rem ſuam amittat niſi ex facto aut delicto ſuo aut neglectu.

41. Intereſt reipublicæ res judicatas non reſcindire.

42. Judicis eſt jus dicere non dare.

43. Ratio eſt anima legis.

44. Qui hæret in litera hæret in cortice.

45. Qui peccat in ſyllaba peccabit in tota cauſa.

46. Perjurii pœna divina exitium humana dedecus.

47. Judicium duodecem proborum & legalium hominum veritatis dictum eſſe per communem Angliæ legem cenſetur.

48. Ad queſtionem facti non reſpondent judices ſed juratores.
Ad queſtionem legis non reſpondent juratores ſed judices.

49. Boni judicis eſt ampliare juſtitiam.

50. Sequi debet potentia juſtitiam non præcedere.

51. Judicia ſunt tanquam juris dicta.

52. Melior eſt conditio poſſidentis.

53. Nemo factum a ſe alienum tenetur ſcire.

54. Quiſquis ſua facta ſcire & preſumitur & debet.

55. NIHIL CALLIDITATE STULTIUS.

56. Periculoſum eſt quod non bonorum virorum comprobatur exemplis.

57. Judicandum eſt legibus non exemplis.

58. Qui prior in tempore potior in jure.

Vicinus facta vicini præſumitur ſcire.

59. Odio & amore judex careat.

60. Ubi eadem eſt ratio idem eſt jus.

61. Lex uno ore omnes alloquitur.

62. Ceſſante ratione legis ceſſat ipſa lex.

63. De non apparentibus & non exiſtentibus eadem eſt ratio.

64. NULLI VENDEMUS NULLI NEGABIMUS AUT DIFFEREMUS JUSTITIAM VEL RECTUM.

65. Lex eſt tutiſſima caſſis.

66. Quod lege tuum eſt amplius eſſe tuum non poteſt.

67. De minimis non curat lex.

68. Ad ea quæ frequentius accidunt jura adaptantur.

69. Conſenſus tollit errorem.

70. Intereſt reipublicæ ut ſit finis litium.

71. Multitudo imperatorum perdidit curiam.

72. Accipere quid ut juſtitiam facias non eſt tam accipere quam extorquere.

73. Conſenſus facit jus.

74. Culpa eſt immiſcere ſe rei ad ſe non pertinenti.

75. Pendente lite nihil innovetur.

76. Idem eſt nihil dicere ac inſufficienter dicere.

77. Ignorantia judicis calamitas innocentis.

78. Quando aliquid prohibetur prohibetur & omne per quod devenitur ad illud.

79. Quando aliquid cui conceditur; conceditur & id per quod pervenitur ad illud.

80. Sub clypeo legis nemo decipitur.

81. Sua cuique domus arx eſto.

82. Judicis officium eſt opus die in die ſuo perficere.

83. Fatetur facinus qui judicium fugit.

84. Qui non negat fatetur.

85. Lex delatores ſemper exhorret.

86. Dilatio quæ pro juſtitia faciat acceptiſſima quæ contra juſtitiam maxime inviſa.

87. Nefarium eſt per formulas legis laqueos innectere innocentibus.

88. Juſtitia debet eſſe *libera* quia nihil iniquius venali juſtitia; *plena*, quia non debet claudicare & *celeris* quia dilatio eſt quædam negatio.

89. Fraus legibus inviſiſſima.

90. Dolus circuitu non purgatur.

91. De fide & officio judicis non recipitur quæſtio; ſed de ſcientia ſive error ſit juris ſive facti.

92. Non accipi debent verba in falſum quæ competunt in verum.

93. Nil cuiquam expedit quod per leges non licet.

94. Quodlibet in lege eodem modo diſſolvitur quo ligatum eſt.

95. Nil utile aut honeſtum quod legibus contrarium.

96. Ex malis moribus bonæ leges oriuntur.

97. Improbi rumores diſſipati ſunto.

98. Lex injuſta non eſt lex.

99. Quicquid per ſe malum eſt id leges omnibus vetant.

100. Ubi damna dantur victus victori in expenſis condemnari debet.

101. Lex eſt ſanctio juſta jubens honeſta & prohibens contraria.

102. ACTUS DEI NEMINI FACIT INJURIAM.

103. ACTUS LEGIS NEMINI FACIT INJURIAM.

104. Præſtat cautela quam medela.

105. Pereat unus ne pereant omnes.

106. Rerum ordo confunditur ſi unicuique juriſdictio non conſervatur.

107. Omnia præſumuntur legibus facta.

108. Stabitur præſumptioni donec probetur in contrarium.

109. Semper pro legitimatione præſumitur.

110. Cuilibet in arte ſua credendum.

111. Plus valet oculatus teſtis unus quam auriti decem.

112. Damnum ſine injuria eſſe poteſt.

113. Par in parem imperium non habet.
Neceſſitatis vincit legem.

114. Lex neminem cogit ad impoſſibilia.

115. Turpe impoſſibile.

116. Fraus & dolus nemini debent patrocinari.

117. Lex certa eſto pœna certa & crimini idonea & legibus præfinita.

118. Omnis nova conſtitutio futuris temporibus formam imponere debet ; non *præteritis*.

119. Carcer non ſupplicii cauſa ſed cuſtodiæ conſtitutus.

120. Pœna non debet ante ire crimen.

121. Omnis indemnatus pro innoxio legibus habetur.

122. Dormiunt aliquando leges, *nunquam moriuntur*.

123. Lex non conſilia nuda ſed actus apertos reſpicit.

124. Qui animo peccandi aliquid facit videtur peccaſſe ab initio.

125. In favorem vitæ libertatis & innocentiæ omnia præſumuntur.

126. Pejus eſt judicio quam per vim injuſte facere.

127. Receditur a placitis juris potius quam delicta remaneant impunita.

128. Omnia honeſte & ordine fiant.

129. Melius eſt ut decem noxii evadant quam ut unus innocens pereat.

130. Nulla unquam de morte hominis cunctatio longa eſt.

131. Judicium redditur in invitos.

132. In civilibus voluntas pro facto reputabitur.

133. In criminalibus voluntas pro facto non reputabitur.

134. Intereſt reipublicæ ut judicia debitæ executioni mandentur.

135. Executio eſt executio legis ſecundum judicium.

136. Malitia ſupplet ætatem.

137. Qui ſuſpicionem peccati inducit peccat.

138. Furioſus ſolo furore punitur.

139. Pœna ad paucos metus ad omnes perveniat.

140. Probationes debent eſſe evidentes perſpicuæ & faciles intelligi.

141. Repellitur a ſacramento infamis.
Qui non luit in crumena luat in corpore.

142. Nemo eſt ſupra leges.

143. Fruſtra legis auxilium implorat qui leges ipſas ſubvertere conatur.

144. Impius & crudelis judicandus qui libertati non favet.

145. Angliæ jura in omni caſu libertati dant favorem.

146. Mitius imperanti melius paretur.

147. Juri non eſt conſonum ut aliquis acceſſorius convincatur antequam aliquis de facto fuerit attinctus.

148. Rex non poteſt ſubditum renitentem onerare impoſitionibus.

149. Quod rex contra leges jubet pro injuſſu reputabitur.

150. Inter arma ſilent leges.
In republica maxime ſunt conſervanda jura belli.

151. Mortuus eſt quem leges non agnoſcant.

152. Omnibus infra regnum morantibus legis remedium patet.

153. Exterus non habet terras; habet res ſuas & vitam & libertatem.

154. Par in parem imperium non habet.

155. Nemini in alium plus licet quam conceſſum eſt legibus.

156. Protectio trahit ſubjectionem & ſubjectio protectionem.

157. LIGEANTIA NATURALIS INTRA NULLOS LOCORUM LIMITES COERCETUR.

158. Vim vi repellere licet modo cum moderamine inculpatæ lutelæ.

159. Quid ſit jus & in quo conſiſtat injuria legis eſt definire.

160. Summa caritas eſt facere juſtitiam ſingulis & omnibus omni tempore.

161. Qui inſcienter læſit ſcienter emendit.

162. Intereſt reipublica ut bonis bene ſit & male malis & ſuum cuique.

163. Qui facit per alium facit per ſe.

164. Ubi ex jure poſitivo alicujus gentis res conceditur vel prohibetur leges Angliæ jus ejus gentis in judicio reſpiciunt ubi actio accrevit.

165. Quod in ſe malum ubicunque factum fuerit nulla juris poſitivi ratione valebit.

166. Quod ab initio non valuit tractu temporis non poteſt convaleſcere.

167. Rerum ſuorum quilibet eſt moderator & arbiter.

168. Qui non prohibet quod prohibere poteſt conſentire videtur.

169. Quod fraude factum eſt in alios *infectum* eſto; contra *fraudatorem valet*.

170. Qui non obſtat cum poſſit *facere* videtur.

171. Qui non vetat cum debeat & poſſit *jubet*.

172. Omnes in defenſionem reipublicæ vita boniſque omnibus cives tenentur.

173. NEMINEM OPORTET LEGIBUS ESSE SAPIENTIOREM.

Maxims of real Property.

174. Hæreditates recta linea debent deſcendere ſed non aſcendunt.

175. Poſſeſſio fratris de fœdo ſimplici facit ſororem eſſe hæredum.

176. Liberum tenementum non poteſt *pendere.*

Of perſonal Property, and Property in general.

177. Actio perſonalis moritur cum perſona.

178. Qui *alienas* res negligenter perdit, aut vi vel dolo malo aufert, *ſuas* amittito.

179. Aer, lux, aqua profluens, feræ, nulli propria omnibus communia.

180. ITA TUO UTERE UT ALIENUM NE LÆDAS.

181. Ex maleficio non oritur contractus.

182. Nemo proprietatem rei ſibi quærat invito domino.

183. Intereſt reipublicæ ut nec quis re ſua male utatur.

184. Cujus eſt dare ejus eſt deſponere.

185. Ex nudo pacto non oritur actio.

186. Ex maleficio non oritur contractus.

187. Dona clandeſtina ſunt ſemper ſuſpicioſa.

188. Traditione pacta firmantur.

189. Non valet pactum de re mea non alienanda.

190. Omnis contractus turpitudinis legibus inviſus.

191. Quod fieri non debuit factum valet.

192. Pacta vel ex naturæ & ſanguinis vi vel ex mutuo fructu vel ex auctoritate & præſumptione legis obligant.

193. Pacta reciproca vel utroſque ligant vel neutrum.

194. In reſtitutionem non in pœnam hæres ſuccedit.

195. Pœna ex delicto defuncti hæres teneri non debet.

196. Qui ſenſit commodum ſentire debet & onus.

197. Nemo judex eſſe debet in propria cauſa.

198. Pœna vel remedium ex incremento quod prius erat non tollit.

Of Religion.

199 Dies Dominicus non eſt Dies juridicus.

200. Qui ſerviunt Chriſto faciunt leges pro Chriſto.

201. Nemo militans Deo implicet ſe negotiis ſecularibus.

202. Qui dat pauperibus Deo dat.

203. SUMMA RATIO EST QUÆ CUM RELIGIONE FACIT.

204. Eccleſiæ eccleſiæ decimas ſolvere non debet.

Of Morals.

205. Omne crimen ebrietas & incendit & auget.

206. Omnis laſcivia legibus vetita.

207. Alea & ganeo res turpiſſimæ.

208. Res ſtulta eſt nequitiæ modus.

209. Principiis obſiſtendum.

210. Qui bonis viris pauperibus dat legibus opitulatur; qui malis & inertibus ſegetem malorum fovet & legum opprobrium.

211. Qui inertibus dat induſtrios nudat.

212. Veritas a quocunque dicitur a Deo eſt.

213. Extrema potius pati quam turpia facere.

214. Servile eſt expilationis crimen.

214.* SOLA INNOCENTIA LIBERA.

Of Huſbands.

215. Omnia Uxoris durante conjugio Mariti ſunt.

216. Uxor et Maritus unum in lege.

217. Maritus in delicto uxoris tenetur.

218. Conſenſus non concubitus facit matrimonium.

219. Uxor ſub poteſtate viri.

220. Charta ejus quæ ſub poteſtate viri ſit in lege nulla.

Of Parents.

221. Pater eſt quem nuptiæ demonſtrant.

222. Parentum eſt liberos alere etiam nothos.

Children.

223. Nothus nullius eſt filius.

224. Liberi parentibus qui nequeant victum tolerare opitulantor.

Servants.

225. Non omnia domino in ſervos licita.

226. Dominus vel cauſam ſervi vel perſonam inculpato defendet, etiam ubi alii non liceret.

227. Actus ſervi in iis quibus opera ejus communiter adhibita eſt actus domini habetur.

228. In civilibus miniſterium excuſat in criminalibus non item.

229. Injuria ſervi dominum pertingit.

Of the Interpretation of Statutes.

230. Contemporanea expoſitio eſt optima.

231. Maledicta expoſitio quæ textum corrumpit.

232. Lex beneficialis rei conſimile remedium præſtat.

233. Quæcunque intra rationem legis inveniuntur intra ipſam legem eſſe judicantur.

234. Confirmatio eſt poſſeſſionis jure defectivæ per eos quorum jus eſt ratihabitio.

235. Generale dictum generaliter eſt intelligendum.

236. Abſoluta ſententia expoſitore non indiget.

237. Optima interpres legum conſuetudo.

238. Ubi lex eſt ſpecialis et ratio ejus generalis generaliter eſt accipienda.

239. Leges poſteriores priores abrogant.

240. Reſervatio ut et proteſtatio non facit jus ſed tuetur.

Of Deeds.

241. Verba fortius accipiuntur contra proferentem.

242. Ubi duo pugnantia in charta concurrunt prius ratum eſto.

243. Benigne faciendæ ſunt interpretationes chartarum ut res magis valeat quam pereat.

244. Nimia certitudo certitudinem ipſam deſtruit.

245. Nullius charta legibus poteſt derogare.

246. Verba legis non ex vulgari ſenſu ſed ex legis ſenſu, neque laxam et precariam ſed certam et legibus præfinitam interpretationem requirunt.

247. Lex noſtra neminem abſentem damnat.

248. Ambiguitas verborum latens verificatione facti tollitur.

249. Ambiguitas verborum patens nulla verificatione excluditur.

Of Wills.

250. Teſtamenta propter inopiam conſilii ad mentem teſtatoris interpretanda etſi verba ſolemnia deſint.

251. Si duo in teſtamento pugnantia reperientur ultimum eſt ratum.

252. Teſtamentum niſi poſt mortem teſtatoris vim non habet.

253. Ubi ſuſtuleris revocationem renatum eſt teſtamentum.

Rules common to Wills and Deeds.

254. Verba generalia reſtringuntur ad habilitatem rei vel perſonæ.

255. Verba relata id maxime operantur ut ineſſe videatur

256. Intentio legitime cognita et legibus conſentanea maximi habenda.

257. Donatio quælibet ex vi legis ſortitur effectum.

258. Non dat qui contra leges dat.

Rules concerning public Rights concurring with private.

259. Neceſſitas publica major eſt quam privata.

260. Quando jus regium et ſubditi concurrunt jus regium præfertur.

Other

Other General Maxims and Rules.

261. Res inter alios acta alteri nocere non debet.

262. Dignus mercede operarius.

263. Periculoſum eſt res novas et inuſitatas inducere.

264. Plus peccat auctor quam per quem agitur.

265. Poſſeſſio contra omnes valet præter eum cui jus ſit poſſeſſionis.

266. Prohibetur ne quis faciat in ſuo quod nocere poſſet alteri.

267. Panis egentium vita pauperum et qui defraudat eos vir ſanguinis.

268. Nunquam recurritur ad extraordinarium ubi valet ordinarium.

269. Lex ſpectat naturæ ordinem.

270. Quod remedio deſtituitur ipſa re valet ſi culpa abſit.

271. Debitum ſequitur perſonam.

272. Qui prior in tempore potior in jure.

273. Cujus eſt ſolum ejus eſt uſque ad cœlum.

274. Infantes de damno præſtare tenentur; de pœna non item.

275. Non minor eſt proditio legis quam regem velle perdere.

276. Majus trahit ad ſe minus.

277. Certum eſt quod certum reddi poteſt.

278. Acceſſorium non ducit ſed ſequitur ſuum principale.

279. Quædam in majus malum vitandum permittet lex qua tamen nequaquam probet.

280. Multa non vetat lex quæ tamen tacite damnat.

281. Multa non legibus humanis ſed foro divino pertinent.

282. Omnia Deo *grata*, hominibus *utilia* reipublica *honeſta* privatis *juſta* et *commoda* probant leges: Et pro viribus cuique imponunt.

283. Quando plus fit quam fieri debet videtur etiam illud fieri quod faciendum fuit.

284. Quod ſemel placuit in electionibus amplius diſplicere non poteſt.

285. Ubi factum nullum ibi fortia nulla.

286. Terra tranſit cum onere.

287. Nemo foreſtam habet niſi rex.

288. Præſcriptio non datur in bona felonum niſi per recordum.

289. Non impedit clauſula derogatoria quo minus ab eadem poteſtati res diſſolvantur a quibus conſtituuntur.

290. Perſona conjuncta æquiparatur intereſſe proprio.

291. Ubi duo jura concurrunt in eadem perſonâ idem eſt ac ſi eſſet in diverſis.

292, In jure non remota cauſa ſed proxima ſpectatur.

293. Potius eſt privatum incommodum quam publicum malum.

294. Quilibet renunciare poteſt juri pro ſe introducto.

295. Solus Deus hæredes facit non homo.

296. Modus et conventio vincunt legem.

Bodies Corporate.

297. Collegium ſeu corpus corporatum niſi regiis conſtitutionibus non poteſt exiſtere.

298. Rex nil dat niſi per recordum.

299. Corpus corporatum non habet hæredes neque executores neque mori poteſt.

300. Si quid univerſitati debetur ſingulis non debetur, neque quod debet univerſitas ſinguli debent.

301. Sodales legem quam volent, dum ne quid ex publica lege corrumpant ſibi ferunto.

302. Corpus corporatum ex uno poteſt conſiſtere.

303. Corpus corporatum neque in lite ſiſti neque utlagari, neque bona forisfacere, neque attinctum pati, attornatum facere, neque excommunicari poteſt.

304. In rex non poteſt conjunctim tenere cum alio.

305. Rex neque ſolvit damna in lege neque recipit.

306. Rex lege cadere non poteſt.

Infants.

307. Infans eſt qui propter defectum ætatis pro ſe fari nequeat.

308. Contractus infantis invalidus ſi in damnum ſui ſpectet.

Of the Church.

309. Eccleſia ſemper in regis eſt tutela.

310. Qui altari ſerviunt ab altari vivant.

311. Nemo poteſt epiſcopo mandare præter regem.

312. Ubi remedium in foro ſeculari ejus rei juriſdictio curiis ſecularibus tantum datur, niſi ſervato jure eccleſiæ ipſis verbis.

313. Meliorem conditionem eccleſiæ ſuæ facere poteſt prælatus deteriorem nequaquam.

Other general and particular Maxims.

314. Ubi non eſt lex ibi non eſt tranſgreſſio.

315. Jura ſanguinis nullo jure civili dirimi poſſunt.

316. Uxor in mariti poteſtate cum ſit non obnoxia eſt in cauſis reatus minoribus; aliter in majoribus proditione et homicidio.

317. Jurata debet eſſe omni exceptione major.

318. Mandata licita ſtrictam interpretationem recipiunt; ſed illicita latam et extenſivam.

319. Parum proficit ſcire quid fieri debet ſi non cognoſcas quo modo ſit faciendum.

320. Qui omne dicit nihil excludit.

321. Exceptio probat regulam.

322. Nemo contra factum ſuum venire poteſt.

323. Derivativa poteſtas eſt ejuſdem juriſdictionis cum primitiva.

324. Quod fieri vetatur ex directo, vetatur etiam ab obliquo.

325. In fictiore juris ſemper ſubſiſtit æquitas.

326. Cauſa publica vicarium non recipit.

327. Reſpondeat ſuperior.

328. Caveat emptor; caveat venditor.

329. Non eſt deleganda reipublicæ cura perſonæ non idoneæ.

330. Ex diuturnitate temporis omnia præſumuntur ſolleniter acta.

331. Jus accreſcendi inter mercatores locum non habet.

332. Jus accreſcendi præfertur oneribus.

333. DIGNITATES REX DAT, VIRTUS CONSERVAT, DELICTA AUFERUNT.

334. Dignitas ſupponit officium et curam et non eſt partibilis.

Cuſtom.

335. Conſuetudo eſt bonus rationabilis *certus* et *communis* loci alicujus uſus cui memoria hominis non currat in contrarium.

336. Conſuetudo totius Angliæ eſt lex totius Angliæ communis.

337. Conſuetudo non præjudicat veritati.

338. Conſuetudo alicujus loci lex eſt ejus loci; legi communi ſpecie diverſa ſed non in genere contraria.

339. Conſuetudo maneriorum domini voluntatem regit.

340. Conſuetudo neque injuria oriri neque tolli poteſt.

341. CONSUETUDO POPULI ANGLICANI et COMMUNIS LEX LIBERTAS.

342. Libertas eſt cum quiſque quod velit faciat modo ſecundum leges, bonas, *communi conſenſu latas*, *certas*, *præfinitas*, *apertas*.

343. Nolumus leges Angliæ mutari quæ hucuſque uſitatæ ſunt atque approbatæ.

344. Majus eſt delictum ſeipſum interficere quam alium.

345. Libertas nullo pretio penſabilis.

346. Minima pœna corporalis eſt major quavis pœna pecuniaria.

347. Volenti non fit injuria.

348. Pirata communis omnium hoſtis.

349. Verba homicidium non excuſant.

350. Verba temere prolata parum curat lex.

351. Generalis gratia proditionem et homicidium non excipit pœna.

352. Lex orbis, inſanis, et pauperibus, pro tutore atque parente eſt.

353. Hæreditas ex dimidio ſanguine non datur.

354. Cuſtos corporis cujuſque infantis eſt is eſto ad quem hæreditas nequeat pervenire.

355. In præſentia majoris ceſſat poteſtas minoris.

356. Omne jus et omnis actio injuriarum tempore finita et circumſcripta ſunt.

357. RADIX ET VERTEX IMPERII IN OBEDIENTIUM CONSENSU.

358. Quoties aliquid dubitatur vel male eſt, ad principia recurrendum.

359. Qui beneficium legis extra ordinem quærit puras manus afferto.

360. Qui alterum incuſat ne in eodem ſaltem genere ſit incuſandus.

361. Nemo tenetur ſeipſum accuſare.

Of Equity

362. Æquitas ex lege generaliter lata aliquid excipit.

363. Æquitas ſequitur legem.

364. Fraus æquitati præjudicat.

365. Quod fieri debuit pro facto cenſetur.

366. Præſenti periculo ſuccurrendum nequa oriri poſſit injuria.

367. Quod conſcientia vult ubi lex deficit æquitas cogit.

368. Æquitas nunquam contravenit legi.

369. Æquitas non medetur defectu eorum quæ jure poſitivo requiſita alium.

370. Culpa vel pœna ex æquitate non intenditur.

371. Qui æquitatem petit æquitatem faciat.

372. Æquitas uxoribus, liberis, creditoribus maxime favet.

373. Æquitas rem ipſam intuetur de forma et circumſtantiis minus anxia.

174. Æquitas

374. Æquitas vult ſpoliatos, vel deceptos, vel lapſos ante omnia reſtitui.

375. Æquitas non vaga atque incerta eſt ſed terminos habet atque limites præfinitas.

376. Æquitas non vult res novas atque inuſitatas inducere.

377. Ubi lex communis et æquitas in eadem re verſantur æquitas alia via agit ſed non aliter ſentit.

378. Æquitas eſt quaſi æqualitas.

379. Æquitas non facit jus ſed juri auxiliatur.

380. Æquitas vult omnibus modis ad veritatem pervenire.

381. Suppreſſio facti tollit æquitatem.

382. Æquitas ſupervacua odit.

383. Æquitas nil ſtatuit niſi in partes.

384. Æquitas ignorantiæ opitulatur oſcitantiæ non item.

385. Æquitas in paribus cauſis paria jura deſiderat.

386. Æquitas rei oppignoratæ redemptionibus favet.

387. Æquitas non ſinit eum qui jus *verum* tenuit *extremum* jus perſequi.

388. Æquitas non ſinit ut eandem rem duplici via ſimul quis perſequatur.

389. Omnia præſumuntur in odium ſpoliatoris.

390. Æquitas in eum qui vult ſummo jure agere ſummum jus intendit.

391. Æquitas non ſupplet ea quæ in manu orantis eſſe poſſunt.

392. Æquitas non tenetur adjuvare ubi non eſt nodus dignus vindice.

393. Æquitas juriſdictiones non confundit.

394. Nil iniquius quam æquitatem nimis intendere.

395. MELIUS EST JUS DEFICIENS QUAM JUS INCERTUM.

396. DECIPI QUAM FALLERE EST TUTIUS

397. Æquitas neminem juvat cum injuria alterius.

Of Pleas and Indictments.

398. Placitorum alia dilatoria alia peremptoria.

399. In capitalibus quid, quomodo, quando, ubi, a quo factum, cum circumſtantiis ſollenibus, debet exponi.

400. In capitalibus ſufficit generalis malitia cum facto paris gradus.

401. Placitum nemo caſſabit niſi melius dando.

402. Qui ordine ulteriora admittit præcedentia affirmat.

403. Utlagatus non poteſt placitare.

404. Duplex placitum non admittitur.

405. Ubi lex cogit aliquem oſtendere cauſam neceſſe eſt quod cauſa ſit juſta atque legitima.

406. Circuitus in lege odioſus.

407. Qui non vult intelligi debet negligi.

408. Qui cauſa decedit causâ cadit.

409. Qui tempus prætermittit cauſam perdit.

410. Placitum mendax non eſt placitum.

411. Ut ne quid *nimis* cavendum; ut ne quid deficiens *duplo* cavendum.

412. Superflua obſtant; defectiva perimunt.

413. Placitum debet eſſe verum, ſufficiens, certum, ſimplex, et *brevi* congruens, et præcedentibus conſtans et ordinem ſpectans.

414. **Placitum affirmativum ſine negativo exitum non facit.**

415. **Placita negativa duo exitum non faciunt.**

416. **Placita debent apte concludere.**

417. **Placita ex directo eſſe debent et nil per inductionem ſupponere.**

418. **Habendum in charta vel auget vel reſtringit ſed non novum inducit.**

419. Clauſula generalis de reſiduo non ea complectitur quæ non ejuſdem ſint generis cum iis quæ ſpeciatim dicta fuerant.

Of Actions of Slander on the Caſe.

420. Innuendo non facit verba per ſe actioni obnoxia ſi aliter non eſſent.

421. Ubi duo ſenſus occurrunt mitiori ſtandunt.

422. Aperte impoſſibilia cum dicuntur non faciunt calumniam.

423. Debet eſſe vel aliquod ſpeciale damnum emergens vel ſaltem aliquod gravamen quod nocere poſſit et videatur probabiliter nociturum.

Of Inheritances and incorporeal Rights.

424. Non eſt exhæredatio niſi hæreditas alio transferatur.

425. Preſcriptio eſt titulus qui ſequitur perſonam, ex uſu et tempore ſubſtantiam capiens ex authoritate legis.

426. Modus debet eſſe certus rationabilis et perantiquus.

427. Modus de non decimando non valet.

Other Maxims of civil and criminal Juſtice, Order and Policy.

428. Crimen omnia ex ſe nata vitiat.

429. In civilibus *proxima* et directa præſtare quis tenetur; in criminalibus etiam *conſequentia*.

430. Nemo bis punitur pro eodem delicto.

431. Nemo bis in periculum veniet pro eodem delicto.

432. Crimen ex poſt facto non diluitur.

433. In capitalibus minor eſt pœna cogitationis manifeſtæ quam conatus ex actu directo; et minor conatus quam patrati facinoris: Ut ſit pœnitentiæ locus. Sed in proditione in terrorem aliter ſtatutum eſt.

434. Cruciatus legibus inviſi.

435. Particeps criminis non eſt audiendus.

436. In Pari delicto potior eſt conditio deſendentis.

437. Nemo procerum vel in jurata poni vel ſeneſcallus manerii eſſe debet propter dignitatem.

438. Beneficium clericale omnibus patet ubi pœna capitalis ſtatuto inducitur niſi ex expreſſo tollatur.

439. Nemo qui non ſit clericus beneficium clericale habebit bis.

440. Metus quem agnoſcunt leges in excuſationem criminis eſt talis qui cadere poſſit in conſtantem virum.

441. Fama eſt conſtans virorum bonorum de re aliqua opinio.

442. Ubi lex eſt ſpecialis et ratio ejus generalis generaliter eſt accipienda.

443. Ceſſante cauſa ceſſat effectus.

444. Unuſquiſque paci et juſtitiæ publicæ tenetur ſuccurrere.

445. QUAMVIS ALIQUID EX SE NON SIT MALUM TAMEN SIT MALI EXEMPLI NON EST FACIENDUM.

446. JURISCONSULTI OPERA EST HONORARIUM QUIDDAM NON MERCENARIUM.

447. Qui extra cauſam divagatur calumniando, punitor.

448. Communiter unum officium eſt excuſatio alterius.

449. Spoliatus debet ante omnia reſtitui.

450. Summum jus ſumma injuria.

451. Apices juris non ſunt jura.

452. Par ſcientia pares contrahentes facit.

453. Rex non poteſt invitum civem regno depellere.

454. NEMO IDONEUS PUBLICUM MUNUS IMPOSITUM POTEST RECUSARE.

455. Ubi ſubſtitui vicarius poteſt non eſt cogendus quis ad ſubſtituendum ſed ſi ſubſtituere velit inveniat idoneum.

456. Fœminis et infantibus per vicarium multis muneribus licet fungi.

457. Miniſteria recipiunt vicarium ſed non item pleraque judiciaria.

458. Actus judiciarius coram non judice irritus habetur; de *miniſteriali* autem a quocunque provenit, ratum eſto.

459. Quæcunque lex vult fieri non vult fruſtra fieri.

460. Actionum genera maxime ſunt ſervanda.

461. Infinitum in jure reprobatur.

462. Exceſſus in re qualibet jure reprobatur communi.

463. Quicquid contra bonos mores facit jure communi vetitum.

464. Ubi vetat quid lex neque pœnam ſtatuit pœna in diſcretione judicis eſt.

465. Nil tam proprium imperii ac libertatis quam legibus vivere.

466. Nulla pœna capitis nulla quæ hominem remve ejus deſtruat eſſe poteſt niſi legibus præfinita.

467. Non crimen per ſe neque privatum damnum ſed publicum malum leges ſpectant.

468. Venia non poteſt ante venire delictum.

469 Excambium non poteſt eſſe rerum diverſæ qualitatis; neque excambium inter tres partes datur.

470. Satisfactio non fit de minori.

471. Venia privatim læſi non ſufficit legibus.

472. Non eſt dives rex ubi ſubditi pauperes.

473. FIAT JUSTITIA RUAT CÆLUM.

474. Verba intelligenda ſecundum ſubjectam materiem.

475. Quæ in partes dividi nequeunt ſolida a ſingulis præſtantur.

276. Utile per inutile non vitiatur.

477. Remoto impedimento emergit actio.

478. Actis legitimi non recipiunt modum.

479. Admiralitas juriſdictionem non habet ſuper iis quæ communi lege dirimuntur.

480. Curia eccleſiaſtica locum non habet ſuper iis quæ juris ſunt communis.

481. Æquum et bonum eſt lex legum.

482. Allegari non debuit quod probatum non relevat.

483. Conſcientia legi nunquam contravenit.

484. Ira hominis non implet juſtitiam Dei.

485. Ephemeris annua pars legis Anglicanæ.

486. Univerſus terminus in lege dies unus.

487. In lege omnia ſemper in præſenti ſtare cenſentur.

488. Benedicta eſt expoſitio quando res redimitur a deſtructione.

489. Beneficium non datur niſi officii cauſa.

490. Benigne faciendæ ſunt interpretationes ut res magis valeat quam pereat, et ut voletur repugnantia et ſupervacua.

491. Bonum neceſſarium extra terminos neceſſitatis non eſt bonum.

492. Ceſſa regnare ſi non vis judicare.

Of Chancery.

493. Curia Cancellaria non niſi parliamento ſubdita.

494. Curia Cancellaria contractibus in plenum redigendis favet.

495. Æquitas nomine pœnæ conſtitutis remedium ex æquo et bono præſtat.

496. Æquitas Curiæ Cancellariæ quaſi filia conſcientiæ obtemperat ſecundum regulas curiæ.

497. Æquitas pars legis Angliæ.

498. Æquitas erroribus medetur.

499. Æquitas caſibus medetur.

500. Æquitas defectus ſupplet.

501. Æquitas nunquam liti ancillatur ubi remedium poteſt dare.

502. Æquitas vult donum quod alteri obſit ex cauſa æque favorabili eſſe ac id quod aufert.

503. Æquitas opitulatur ubi penſationi damni locus eſt.

504. In maxima potentia minima licentia.

505. Quilibet ex virtute ſua non imbecillitate adverſarii debet vincere.

506. Ex nuda ſubmiſſione non oritur actio.

Other General Maxims.

507. Elemoſynæ ad mentem donatoris præcipue ſervandæ.

508. Clerici non ponantur in officio ſeculari.

509. Communis error facit jus.

510. Conditio ex parte extincta ex toto extinguitur.

511. Conditio ad liberum tenenentum auferendum non niſi ex facto placitari debet.

512. Conditiones præcedentes ſtricte interpretandæ ſed non ita de ſubſequentibus.

513. Conſcientia legalis ex lege fundatur.

514. Conſenſus eſt voluntas plurium ad quos res pertinet ſimul juncta, et in criminalibus ſilentium præſentis conſenſum præſumit; in civilibus nonnunquam vel abſentis et ubi ejus intereſt etiam ignorantis.

515. Conſentire matrimonio non poſſunt infra annos nubiles.

516. Conſtructio ad principia refertur rei.

517. Conſtructio ad cauſam refertur.

518. Conſtructio ſecundum æqualitatem rationis.

519. Conſtructio eſt ſecundum æquitatem.

520. Conſuetudo ſemel reprobata non poteſt induci.

521. Incertum ex incerto pendens lege reprobatur.

522. Contractus ad mentem partium verbis notatam intelligendus.

523. Corpus humanum non recipit æſtimationem.

524. Cui licet quod majus non debet quod minus eſt non licere.

525. Quod dubitas ne feceris.

525*. Deſcenſus tollit intrationem.

526. Deſignatio unius eſt excluſio alterius.

527. Expreſſum facit ceſſare tacitum.

528. Patefactio rei trahit ad ſe remedium.

529. Deficiente uno non poteſt eſſe hæres.

530. Diſpenſatio eſt mali prohibiti provida relaxatio utilitate communi penſata.

531. Diſtinguenda ſunt tempora.

532. Doloſus verſatur in univerſalibus.

533. Dona clandeſtina ſunt ſemper ſuſpicioſa.

534. Donatio Principis intelligitur ſine præjudicio tertii.

535. Equitas naturam rei non mutat.

536. Æquitas liberationi & ſeizinæ favet.

537. Expreſſio illorum quæ tacite inſunt nihil operatur.

538. Feodum ſimplex ex feodo ſimplici pendere non poteſt.

539. Scire proprie eſt rem ratione & per cauſam cognoſcere.

540. Fictio cedit veritati.

541. Filiatio non poteſt probari.

542. Flumina & portus publica ſunt.

543. Parcenarii fortunam faciunt judicem.

544. Fraus eſt celare fraudem.

545. Fruſtra expectatur cujus effectus nullus ſequitur.

546. Libertatis eſt ſui quemque juris dimittendi ac retinendi eſſe dominum.

547. Hæres eſt eadem perſona cum anteceſſore.

548. Donatio ex charta non fit ei qui non eſt pars chartæ niſi per remanere.

549. Hæredi favetur.

550. Qui non peccavit pœnam non feret.

551. Qui teſtamenti ex parte beneficium vult univerſo aſſentire tenetur.

552. Ignorantia juris ſui non præjudicat juri.

553. Ignorantia facti excuſat.

554. Simplicitas eſt legibus amica; vis & fraus inviſiſſima; nimia ſubtilitas ſuſpecta.

555. Incerta pro nullis habentur.

556. Incidentia rei tacite ſequuntur.

557. Incivile eſt niſi tota ſententia perſpecta de aliqua parte judicare.

558. In teſtamentis ratio tacita non debet conſiderari.

559. Durum eſt per divinationem a verbis recedere.

560. Judicum eſt iis quæ pro religione faciant favere etſi verba deſint.

561. Judices recenter & ſubtiliter excogitatis minime favent contra communem legem.

562. Jura eccleſiaſtica ſunt limitata.

563. Jura naturæ ſunt immutabilia.

564. Summa charitas eſt facere juſtitiam ſingulis & omni tempore quando eſt neceſſe.

565. Juſtitia liberalitati prior.

566. Jus accreſcendi inter mercatores locum non habet.

567. Rex eſt miſta perſona.

568. Fundi non debent inalienabiles eſſe.

569. Lex neminem cogit oſtendere quod neſcire præſumitur.

570. Perpetuitatibus lex obſiſtit.

571. Lex minori per jus quam majori per injuriam potius favet.

572. Fractionem diei non recipit lex.

573. Lex contra id quod præſumit probationem non recipit.

574. Lex vult potius malum quam inconveniens.

575. Linea recta ſemper præfertur tranſverſæ.

576. Malum quo communius eo pejus.

577. Error placitandi æquitatem non tollit.

578. Moneta eſt juſtum medium & menſura rerum commutabilium.

579. Multa tranſeunt cum univerſitate quæ per ſe non tranſeunt.

580. Negatio deſtruit negationem.

381. Negatio non poteſt probari.

582. Nemo eſt hæres viventis.

583. Diſtrictio non poteſt eſſe niſi pro certis ſervitiis.

584. Non valit impedimentum quod de jure non ſortitur effectum.

585. Pacta privata publico juri derogare non poſſunt.

586. Pendente lite nihil innovetur.

587. Perſonalia transferri in alium nequeunt.

588. Poſſeſſio terminum tenentis, poſſeſſio reverſionarii eſt habenda.

590. Propinquior excludit propinquum; & propinquus remotum; & remotus remotiorem.

591. Quæ incontinenti vel certo fiunt ineſſe videntur.

592. Quæ non valerent ſingula juncta juvant.

593. Quicquid ſolvitur ſolvitur ſecundum modum ſolventis & ſecundum modum recipientis recipitur.

594. Quod tacite intelligitur deeſſe non videtur.

595. Simplicitas legibus amica.

596. Statuta ita interpretanda ut innoxiis ne obſint.

597. Nullum ſimile eſt idem.

598. Traditio loqui facit chartam.

599. Verba currentis monetæ tempus ſolutionis deſignant.

600. Verba relata hoc maxime operantur ut ineſſe videatur.

601. Veredictum in lege æquitati objicitur.

602. Ubi concurrent commune jus & jus ſcriptum communi juri ſtandum.

603. Cum confitente mitius eſt agendum.

604. Cui plus licet quam par eſt plus vult quam licet.

605. Gravius eſt æternam quam temporalem lædere majeſtatem.

606. Satius eſt petere fontes quam ſectari rivulos.

607. Uno abſurdo dato infinita ſequuntur.

608. Non morbus plerumque ſed curatio neglecta interficit.

609. Æſtimatio præteriti delicto ex poſt facto nunquam creſcit.

610. Licet diſpoſitio de intereſſe futuro ſit inutilis tamen poteſt fieri declaratio præcedens quæ ſortiatur effectum interveniente novo actu.

611. Actus incæptus cujus perfectio pendet ex voluntate partium revocari poteſt; ſin ex voluntate tertiæ perſonæ vel ex contingenti revocari non poteſt.

612. Clauſula vel diſpoſitio inutilis per præſumptionem remotam vel cauſam ex poſt facto non fulcitur.

613. Non videtur conſenſum retinuiſſe ſi quis ex præſcripto minantis aliquid immutavit.

614. Nimia ſubtilitas in lege reprobatur.

615. Veritas eſt juſtitiæ mater.

616. REX EST PATER PATRIAE.

617. Male res ſe habet cum quod virtute effici debeat id tentatur pecunia.

618. Nulla res vehementius rempublicam continet quam fides.

619. Summi cujuſque bonitas commune perfugium omnibus.

620. Ne licitatorem venditor apponat.

621. Ne in craſtinum quod poſſis hodie.

622. Quod civile jus non idem continuo gentium; quod autem gentium idem civile eſſe debet.

623. Actio caſus apud noſtrates ea eſt quâ ut inter bonos bene agier oporteat et ſine fraudatione.

624. Fraus adſtringit non diſſolvit perjurium.

625. Qui ſtatuat aliquid parte inaudita altera æquum licet ſtatuerit haud æquus cluet.

626. ÆQUUM ET BONUM EST LEX LEGUM.

627. Beneficium non datur niſi officii cauſâ.

628. Conditio partim extincta in omnibus extinguitur.

629. Mandata legis ad literam caſu aliquo impoſſibilia proxime ad mentem legis exſequenda.

630. Conditio neminem juvabit niſi qui pars fuerit aut privus.

631. Conditio liberum tenementum caſſans non per nuda verba ſine chartâ valebit.

632. Conditiones præcedentes ad normam legis ſevere exigendæ; aliter de ſubſequentibus ubi æquitati licet damnum rei infectæ penſari.

633. Conſcientia legis ex lege pendet.

634. In actis publicis Collegii ſive Corporis alicujus corporati conſenſus eſt voluntas multorum ad quos res pertinet ſimul juncta.

635. Eadem mens uniuſcujuſque præſumitur quæ eſt juris, quæque eſſe debeat; præſertim in dubiis.

636. VITA REIPUBLICÆ PAX ET ANIMUS LIBERTAS ET CORPUS LEGES.

637. ÆQUITAS VERITATIS FILIA, BONITATIS ET JUSTITIÆ SOROR.

638. In brevi aut chartâ generalia præcedunt ſpecialia ſequuntur.

639. Qui ab alio derivatum jus habet non alia lege obtinebit ac is unde derivatum eſt.

640. Qui ex parte teſtamenti aliquid donatum accipit univerſo teſtamento ſtabit.

641. Ad electionem non cogitur qui ſtatim mortuo teſtatore eligere non potuit.

642. Lex hæreditates liberas eſſe vult non in perpetuum aſtrictas.

643. Incidentia nolunt ſeparari.

644. Qui libenter, et ſæpe, et parvula de re juramento ſe obſtringit, perjurio proximus eſt.

645. Conditiones quælibet odioſæ; maxime autem contra matrimonium et commercium.

646. MALUM QUO COMMUNIUS EO PEJUS.

647. Quod nullo interno vitio laborat at objecto impedimento ceſſat remoto impedimento per ſe emergit.

648. Ubi diverſo jure in eandem rem venire quis potuit eo jure veniſſe præſumitur quod fortius ac melius ſit.

649. Si mulier, per matrimonium nobilis, nupſerit ignobili deſinit eſſe nobilis.

650. Terminus et feodum non poſſunt conſtare ſimul in una eademque perſona eodem jure.

651. Prætextu legis injuſta agens duplo puniendus.

652. OPTIME CONSTITUTA RESPUBLICA QUÆ EX TRIBUS GENERIBUS REGALI OPTIMO ET POPULARI CONFUSA MODICE NEC PUNIENDO IRRITET ANIMUM IMMANEM AC FERUM NEC OMNIA PRÆTERMITTENDO LICENTIA CIVES DETERIORES REDDAT.*

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* Ex Ciceronis Fragmento.

G R III
BRITISH MUSEUM

A
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OF THE
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It ſeems to be the opinion of the court, that apprentices could not be bound out to a maſter reſident out of the pariſh, though he had an houſe and land within the pariſh belonging to the churchwardens ſo binding out the apprentice. 79, 80.

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Always ſo drawn, unleſs ſpecial directions to the contrary. *ibid.*

Arreſt.

Though a bailiff gets in under a *falſe* pretence, yet he who *reſiſts* him does it at his peril. 62.

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It ſeemed to be held that on circumſtances arreſt might be good to detain the party in cuſtody, though the party arreſting might be puniſhable of treſpaſs or contempt. 433 *ſed qu. de hoc.* v. *Bailiff.*

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A word of very large extent, and applying to thoſe who come in under the title of another, whether they are in by act of law or ſimply by voluntary act of the party. *v.* 319.

Aſſumpſit.

Will not lie againſt a perſon who receives as a collector in legal office, and has paid over. 534.

Plea of *non aſſumpſit infra ſex annos.* Evidence that within the ſix years the defendant met a man in a fair, and ſaid he went to the fair to avoid the plaintiff to whom he was indebted. This takes it out of the ſtatute of limitations. 86.

So if *B.* is indebted to *A.* and *A.* comes to him within the ſix years and ſays you are indebted to me in ſuch a ſum: And *B.* ſays no; but we will ſettle the account. 87.

May be brought where there is a tort, which is a proper ground for trover or treſpaſs. 208.

Action of Aſſumpſit.

J. W. being a clerk to the plaintiff, a brewer, " and receiving " money from the plaintiff's cuſtomers, to the uſe of the plaintiff, and alſo negotiable notes in the ordinary courſe of the " plaintiff's trade, for the uſe of the plaintiff, paid ſeveral ſums " aſcertained in the verdict, and amounting in the whole to 459 *l.* " 4 *s.* 4 *d.* to the defendant upon *chances* of the *coming up* of *tickets* " in the *ſtate lottery* of the year 1772, *contrary* to the *act* of *parliament* of the ſaid year. The plaintiff had given a *releaſe* to " his clerk, and to the *ſureties* of the clerk, for the ſaid money, " no part of which came to the plaintiff's uſe, and *not returned* " upon

" upon *demand*. Verdict for the plaintiff, ſubject to the opinion " of the court upon this foregoing caſe.

The queſtion ſubmitted to the court was, whether the plaintiff had a right to recover in this action.

Second, whether the witneſs was admiſſible?

The court determined in the *affirmative* of *both*. *v.* 756 to 759.

v. *Fraud*.

Attachment.

Never abſolute in the firſt inſtance where a cauſe may be ſhewn. *v.* 159, 304, 305.

Not to be moved againſt the ſheriff for not bringing in the body, until you have excepted to the bail. *ibid.*

Is not in the nature of an original. 273.

Rule to be ſerved upon the ſheriff in order to entitle to an attachment, not upon his ſervant at his private houſe, but by perſonal ſervice at the office. 302.

Held to be of courſe for non-performance of an award. 451.

Attorney.

The court will not permit an attorney to declare that his client told him before action brought he would waive his action, thereby defeating the client of his remedy. 27.

Not to be held to bail in civil caſes, for he is always in *curia*. 149.

Shall not be proceeded againſt by way of attachment, where he appears to have acted for the beſt, though erroneouſly. 188, 189.

Service on his agent is ſervice to himſelf when he is out of the way. 247.

Attorney it ſeems, being ſworn of a particular court, may be under the control of the court in matters not directly in his buſineſs as attorney, becauſe he gains credit as an officer of the court; and therefore the court may call on him as *ſuch*, to rectify miſconducts which he may have committed acting under that credit, though he acted not as attorney. 271, 272.

Cannot diſcharge a debtor, and give a receipt acknowledging *ſatisfaction*, and then come upon his client inſiſting he has received only part, nor ſet up this as a defence. 320.

Ought to keep books to prove the ſums which he comes for. Allowance of his bill. 329.

Action not to be brought upon an attorney's bill until a month after delivered. 341.

Attornies names to be entered in a book, and their place of abode, or *ſuch other* place where he may be ſerved with notice; and ſervice at the place where he was laſt entered ſhall be good ſervice; *ſuch other* place was meant in caſe attornies had not a ſettled reſidence in town. 357.

Attorney ſhall not be called to anſwer matters of the affidavit, where the charge imports a miſtake, not a crime. 618.

Award.

Where an award may have been right the court will not *intend* it otherwiſe. 35.
Submiſſion to an award, its ſtrength. 426.
Cannot be affected after the time limited by the ſtatute. 437.
Miſtake ſhould be plain and groſs, in order to ſet aſide an award. 554.

Bail.

Notice that *A. B.* and *C. or two* of them will juſtify bad. 26.
It is uſual to require four bail in felony; but it appears to be in the diſcretion of the court to take fewer if they think them ſufficient. *v.* 50.
Cannot juſtify upon effects abroad out of reach of the proceſs of the court. 34. 147.
Pariſh of their reſidence is too wide a deſignation in notice of bail. 72. 194.
Irregular notice does not make bail bad; but entitles to farther day to juſtify. *ibidem.*
Not preſent at the ſitting of the court, muſt wait until the riſing. 88.
If property of the bail be ſufficiently proved to the extent in which they are to juſtify, the value of the houſe rented by bail is immaterial; for the only purpoſe of knowing whether they have an houſe is to ſee that they have a fixed reſidence. 148.
No ſheriff's officer or perſon concerned in the execution of proceſs ſhall be bail. 153.
Deſcribed hatter, diſcovered to be ſervant to an hatter, and living in a ſeparate houſe; the court rejected him. 187.
Bail ſurnames omitted; time given to juſtify. 187.
Not knowing in how many actions, or for what ſums he is bail—to be rejected. 194.
In the name of *one* of the plaintiffs only, when they are *joint* plaintiffs—bad. 237.
In error cannot ſurrender the principal; but muſt pay the money if judgment is affirmed. *v.* 238.
Notice of three (generally) to juſtify is good; provided they can all juſtify. *v.* 252.
Exception to bail ſtiling himſelf "gentleman," it appearing he had a commiſſion in the *Birmingham* way. The exception held bad. 281.

It is not a ground to reject bail that he has not been aſſeſſed to the poor's rate; for it is only *evidence* of his being an houſe-keeper. 328.

Notice in *Hatton-ſtreet, Middleſex*, held ſufficient. 418.

Juſtification when out of time. 438.

Bail goes no farther than ſecurity in the original action. 545.

A man brought up as an *accomplice* of ſelony, the *principal* not taken, may be bailed. 554.

Motion to diſcharge bail on a commiſſion of lunacy iſſued againſt the principal not good. 617.

Held that when the plaintiff knows the defendant is diſcharged by certificate, he ought to know the bail are diſcharged of courſe, unleſs firſt *fixed* by judgment on *ſcire facias*.

V. *Superſedeas.*

Bailiff.

Held that he needs not be preſent at the ſpot where the arreſt is made, nor actually within *ſight*, nor the exact diſtance material, provided that he came with purpoſe to arreſt, and that the arreſt is made under his authority and direction. 527.

Bills of Exchange.

For rules concerning them vide 536 to 542.

Bank.

Secret truſt againſt him who has open legal title will not affect the bank. 66.

Liable to action if they diſparage title. *ibidem.*

Bankrupt.

1. Commiſſioners have a right to enquire whether one who comes in to prove a debt under a commiſſion means to proceed at law. 52.
2. *A.* has an eſtate to his wife for life; remainder to himſelf for life; remainder to his iſſue by the wife; remainder to himſelf in fee: With power of revocation in himſelf. The wife dies without leaving any iſſue of the marriage. *A.* commits an act of bankruptcy, the aſſignees have the eſtate: And ſo it ſeems they would have had if the bankruptcy had been committed and commiſſion

miſſion iſſued in the life of the wife; for the act of bankruptcy would have been a revocation. 71. And if it was a power dependent on a contingency the aſſignees took the contingency. 71.

3. Held that inſpection of the proceedings ſhall not be granted before the trial to a bankrupt who means to litigate; but at the trial the clerk of the commiſſion ſhall attend.

But creditor ſhall have inſpection. 80.

4. Agreement to keep execution ſecret, and that the perſon againſt whom it is executed ſhall retain the goods is not an act of bankruptcy, where the execution itſelf is adverſe, but is void againſt the creditors. 121, 122.

An act of bankruptcy is a crime by poſitive law, and muſt not be extended by conſtruction to a miſchief againſt which proviſion was not made.

5. Whether an innkeeper ſending out wine deals as a chapman within the ſtatute is proper to be left to the jury upon the quantity. 118.

6. Farmer not a trader within the ſtatutes of bankrupts. 323.

Wherever a man is a trader within any of the ſtatutes of bankrupt it is actionable to ſay he is not worth a groat. *ibidem.*

7. The ſtatutes of bankruptcy, perhaps, do more miſchief than good; but whilſt they continue courts of juſtice muſt decide according to them. 341.

8. Bankrupt may not give money to a creditor to obtain a certificate; but if he has given it the law will enable him to oblige the creditor to refund. 345. v. *Contract.*

9. The parties who have proceeded as in caſe of a bankruptcy are concluded from ſaying, to the prejudice of others, that there was no bankruptcy, but it was a matter concerted between them. 427.

10. Certificate pending ſuit operates in nature of releaſe. 437.

11. *A.* being a creditor of *F. and Co.* gives farther credit for 7000 *l.* which he borrowed for the ſupport of the ſhop, and which was to be replaced in ſix days, being lent during the holidays.

Before the time fixed, and *without* demand, *F.* ſits up all night, and writes the following letter to *A.* the creditor.

"Mr. *F.* conceiving that the money lodged with him was a ſum
" about which, perhaps, even ſome pains had been taken to place
" it there, and that diſputes might ariſe, gives that preference to
" Mr. (*A.*) which he thinks undoubtedly his due."

Two notes incloſed—one for 5,500 *l.* the other 1,700 *l.*

He gives this letter to his (*F.*'s) clerk, to carry to *A.* the creditor, and at four in the ſame morning *abſconds.* The ſame day the commiſſion iſſued. The letter was not delivered till two days after, and which beſides was a day before the day of payment.

12. Determined, that if by *deed* this preference, though *honeſt* and *meritorious* if it had been in his power, would, under the circumſtances of this caſe, have been itſelf an act of bankruptcy in *A.* 2d, that

2d, that it *was* VOID, as againſt the other creditors, being a countermandable action till delivery at leaſt, and *before* delivery *countermanded* by the act of bankruptcy.

13. That had it been in the regular courſe of payment; had legal diligence and ſolicitation been uſed by the creditor to obtain it; had the notes been ſent to ward off an execution iſſued againſt the debtor, without fraud or colluſion; it would have been good.

14. But that here it was *bad*; and would have been, even if the act had been *complete* BEFORE the bankruptcy; being done in *immediate* contemplation of an act of bankruptcy to be committed by the doer, and done with a deſign to deprive the other creditors of that benefit of an *equal* diſtribution of *all* the bankrupt's effects, to which the law entitled them.

15. That it was not neceſſary to make it *void* that it ſhould be an aſſignment of the *whole*: That an aſſignment of the *whole* muſt, indeed, either be under a *fraudulent* truſt, or ſtop all trade, and produce an *immediate* bankruptcy; but an aſſignment of part might be void as againſt creditors, though it were not, upon the circumſtances, an act of bankruptcy.

16. That farther it was bad and void, it not appearing on *what* conſideration, or for *what* debt the notes were paid; and becauſe *A.* the creditor was not bound to have *accepted* them as payment; and becauſe the expreſs declared purpoſe was *void*.

17. To which it was added, that the ſum of the loan and of the notes differed, one amounting to 7000 *l.* the other to 7200 *l.* and that, upon calculation, it could not be for intereſt. 472 to 490.

Bar.

Difference between bar and preſumption againſt a title. v. 505 to 8. 589.

Twenty years quiet and peaceable poſſeſſion ſhall be a bar to informations in the caſe of corporation elections. 553.

Barratry.

What it is. v. *Inſurance.*

Book.

Vide *Abridgment*.

Bond.

Debt is the *ſubſtance*; penalty the form of recovery. 361.
But the court, in the caſe of a penal ſum, provided upon Mr. *Wilſon*'s excellent charity, held otherwiſe upon the particular reaſons of that caſe that both the original ſum and penalty were ſubſtance. 555, 556.

Bribe.

If I lay a perſon five guineas he will not vote for me, this is a bribe. 552.
He who employs an agent for the purpoſe of bribing cannot recover the money given to the agent for that purpoſe. v. *Illegal Contract*.
A perſon who has taken the oath againſt bribery may be witneſs of the bribe given.
It ſeems alſo the bribor may recover againſt the bribee; for in doing this he ſubverts the illegal contract, which the law will permit him to do, though not to maintain it. v. *Illegal Contract*.

Bridges.

Vide ſtatutes concerning repair of.
When it does not appear who ſhould repair it is upon the inhabitants of the county for 300 feet beyond the bridge—and the ſtatute giving juriſdiction to the juſtices in their ſeſſions does not take away the common law juriſdiction of the court of *B. R.* in this caſe. 239.

Caſes.

Settling of caſes, the order and diſpatch to be obſerved in it, 82, 83.
As a caſe is ſettled before a jury ſo it muſt ſtand, 83.
Putting off by conſent not to be allowed without good cauſe, 83.

Doubted or denied to be law.

Tomkyns and *Bernet* denied. 345.

A Table of the Principal Matters.

Certiorari.

Will not be granted, eſpecially where the city of *London* is concerned, without full cauſe. 61.

Circuity.

Odious in the law. v. 227, 389.

Children.

Grandchildren take by implication, as children. v. *Pitt* v. *Harbin*. p. 19, 20.

Common Law.

Supports morality. 385.

Is the beſt bulwark of every man's liberty and property. v. the caſe of general warrants, and p. 378.

Is the aſylum of the good and juſt; but not of wrong-doers, to protect their wrong. 382.

Compoſition.

Upon penal ſtatutes the court will admit cautiouſly, to avoid colluſion. 372, 395, 400.

Conſequential Damages.

Vide *Inſurance*.

Conſolidation of Cauſes.

Where there is an agreement that ſeveral cauſes ſhall abide the event of one, ſuch event is to be underſtood as ſhall do juſtice to the full ſatisfaction of the court. 147. 151, 152.

Conſpiracy.

In an indictment for a conſpiracy it is not neceſſary to prove an actual conſpiracy or expreſs malice; but conſpiracy and malice are to be inferred from the circumſtances of the fact, according to the law upon it.

Contempt.

Where there are faults on both ſides, and the officer executing proceſs has behaved unjuſtifiably as well as the parties who reſiſted him, the court generally will not grant extraordinary proceſs of contempt. 36.

Contract.

If *A.* has a ſlave in *Virginia*, or any country where ſlavery is eſtabliſhed by law, and enters into a contract with *B.* (both *A.* and *B.* then being in *England)* that he will ſell him this ſlave, the court here will give *B.* his remedy on action upon breach of this contract. 17.

But where the perſon of the ſlave himſelf is the object of the action, that perſon, if he be in *England*, is under the protection of our laws here, and the maſter ſhall not uſe him as his ſlave, nor recover him by action as his ſlave. v. *Negro* v. *S.* 19.

Where a perſon comes to demand upon an *illegal* contract to have the *performance* of it he ſhall not be aſſiſted; but where he comes in *ſubverſion* of the contract the law will relieve him, though *particeps criminis*. v. 345.

Vide *Aſſumpſit*.

Conſtruction of Words in a Will.

"Eſtates for the purchaſe whereof I have already contracted and agreed:" Held that purchaſed eſtates would paſs under this deviſe as well as eſtates in contract. v. *Will.* p. 113. *B. R. contra* in the Common Pleas, and v. p. 349 to 351.

Where words of *locality* are uſed *eſtate* is reſtrained from ſignifying the entire intereſt of the owner, which it might otherwiſe impart to a *life intereſt* given by him *out* of the thing ſo deſcribed by its local ſituation. v. 224.

Deviſe of an *houſe* to *ſeven* perſons, *equally to be divided amongst them*, paſſed an eſtate of inheritance, becauſe otherwiſe the deviſees could take no ſuch benefit as ſeemed intended for them. 223.

The beſt rule in the conſtruction of wills is to find the general intent; and then, as much as grammar and language will permit, to interpret particular expreſſions accordingly. v. 270.

Vide *Will.*

Conſideration.

What is ſimply a good conſideration;

What valuable;

What fraudulent or voluntary. *v.* 216 to 218.

Goods ſold to *C.* in conſideration that *A.* promiſed *B.* the vendor, that, *if C.* the vendee, did not pay, he, *A.* would.

Determined that the vendor could not come upon *A.* for payment till they had uſed *diligence* to have the *debt* from the perſon *firſt* liable. 769, 770.

But the court would not ſay whether on this caſe they could have come againſt *A.* then. 770.

Where *before* delivery *A.* ſays to *B.* "you may deliver the goods to "*C.* I will be your paymaſter," *A.* is the *original* debtor; but there is a *nicety* where he ſays "*if* he does not pay I will." 770.

Conſtables.

Held that the reſiants of a leet are not excuſed from ſerving as conſtables to the hundred. 420.

Contingency.

Double contingency, or contingency with a double aſpect, what. 174.

Conviction.

Muſt agree with the affidavit that ſupports it. 184.

Does not hinder evidence till a man be *attainted* by judgment. 376.

Copyhold.

The tenant by admittance is only according to the quality of his eſtate: And the lord, through his ſteward, only an inſtrument to convey. 390.

Cuſtom of copyhold. *v.* 398.

Corporation.

The court will not *intend* any thing to make an election void after an acquieſcence of many years. 44.

That the mayor of common right has no caſting vote, but muſt maintain his claim to it by charter or uſage. 315.

In a charter to a corporation words in reſtraint of trade are very unfavourable, and where they are doubtful the court will take them in that ſenſe which makes leaſt againſt the liberty of commerce: Even where they are *clear* the court will *preſume* a renunciation of ſuch privileges, where there is no evidence of *uſage* to ſupport them. 334. 339.

After a diſtance of time the court will not try rights of perſons elected when the evidence is probably loſt, and the queſtion turns on a point of fact, and by annulling the elections the corporation, conſiſting of a definite number, might be extinct. 519. Otherwiſe where a queſtion of law, and the burgeſſes indefinite. 519.

Held that an infant might be *choſen*, but could not be admitted till of age. *ibidem.*

By preſcription *preſumes* a charter. 558.

Coſts.

In ejectment where judgment againſt defendant by default *no* coſts; becauſe the defendant is *nominal*: But you may bring an action in conſequence of judgment to recover *meſne* profits and coſts. 451.

Coſts partake of the nature of the original debt. 617.

Coſts out of pocket the largeſt coſts. *ibidem.*

Counts v. Pleading.

Plaintiff counts that defendant, being ſheriff of *M.* ſuffered the plaintiff's debtor to *eſcape—per quod* he loſt his debt.

2d, That defendant, being ſheriff, *ut ſupra*, *might* have *arreſted* the plaintiff's debtor, and *did not*.

Judgment for the plaintiff in *C. B.* Error for repugnancy of the counts. Judgment affirmed. 69, 70. v. *Maxim.*

Courts.

Every court ought to maintain its own juriſdiction, and mutually each others. *v.* 160.

Covenant.

Leſſee covenants to leave ſufficient compoſt on the ſoil of the landlord at the end of the term, he, the leſſee, *having* the yard, barn, and a room to lodge in, and dreſs diet. This is a mutual covenant, and not a condition. 57.

Plaintiff covenants to be the defendant's hired ſervant for a year and a quarter, and that he, the plaintiff, would pay at the expiration of the term 200 *l.* and that at the end of the term he, the defendant, would ſurrender his trade and buſineſs to *J. P.* the plaintiff's nephew, or ſuch perſon as the plaintiff ſhould appoint; and thereupon breach aſſigned, "*that he did not ſurrender*, &c."

Seven different counts pleaded to this by the defendant, of which five went *en pais* to a jury, and two were in demurrer at law.

The principal in demurrer was, that plaintiff *did not find ſufficient ſecurity for the payment of the ſum ſtipulated.*

The finding the ſecurity is a *condition precedent*, to be *firſt* performed before the plaintiff was intitled to the ſurrender. 198.

Independent covenants cannot be ſet off againſt one another. *ibid.*

Reciprocal covenants are where one is to do ſuch an act, the other *doing* ſuch an one, and both are ſimultaneous. There each is to be ready to do his part before he can come againſt the other. *ibid.*

Where covenants are ill arranged the court will marſhal them according to the intent and nature of the contract. *ibidem.*

And whether condition is precedent or not is to be learned from the *nature* of the tranſaction and meaning of the parties. *ibidem.*

Covenant to ſecure poſſeſſion is generally to be underſtood againſt diſturbance by *lawful* title: For the covenantee may have treſpaſs for unlawful diſturbance, and the law will not intend that another covenants to do for him what he can do and ought to do for himſelf. 460, 461.

Coverture.

Advantage not allowed upon *motion* of evidence offered to prove that the defendant was a married woman, in order to obtain a diſcharge from arreſt; but if ſhe had any thing of this kind, whereof ſhe might avail herſelf, ſhe was left to *plead* it. 228. 395, 396.

Creditor.

His intereſt in adminiſtration bond. *v.* 622 to 628.

A Table of the Principal Matters.

Cuſtom.

There is a diſtinction where the cuſtom is pleaded as a *defence* to the action, and where as a *ground* of the action. 138.

When a feme covert, by the cuſtom of *London*, has authority to trade as a feme ſole, and enters up judgment as a feme ſole, it does not appear that this extends to impower her to contract a debt by *bond* without her huſband, and the debt ought to appear to have been in the courſe of her buſineſs, *as* a *ſole* trader, and not otherwiſe, and ſhe cannot give a warrant of attorney to enter up judgment upon her debt, as ſole trader, in a court of common law, without her huſband's name being joined, nor can ſhe ſue or be ſued in a court of common law without her huſband; for though where the *right* is eſtabliſhed by cuſtom of a *foreign* court the court here will give judgment according to *that* right, yet the *form* of recovery muſt be according to the courſe of proceedings in the court in which you ſue for judgment.

And indeed it did not appear that, even by the cuſtom in the city, in the caſe before the court, ſhe could have ſued or been ſued in the city courts without uſing the name of her huſband for *form*, though for his ſecurity he was not to be charged with her debt, contracted in her ſeparate trade.

Of merchants, vide *Merchants*.

Cuſtom-houſe.

Held *Eaſter* term, 13 *G.* 3. that cuſtom-houſe officer had not a right to a ſecond guaging of a veſſel before he granted a permit. *v.* 204 to 205.

Damages.

EXCESSIVE. See *Verdict*.

500 *l.* for breach of promiſe of marriage given.

Damages to be eſtimated according to the rank and ability of the offender, the nature of the offence, and the circumſtances aggravating or extenuating. *ibidem.*

Where damages are given not beyond the declaration, nor for matters not within the action, the jury are the proper judges, and the court will not incline to unſettle them; unleſs the matter admits of a *certain* eſtimation, and the jury have violently and extravagantly exceeded it: But where the cauſe is an injury to *perſon* or *reputation* there is no *certain* meaſure of damages, and the jury ought to decide. 773, 774.

A Table of the Principal Matters.

Debt.

Vide *Inſolvent Act.*

Declaration.

To whom to be delivered. v. *Delivery.*

Before appearance declaration *de bene eſſe.* 333.

Declaration againſt a corporation for not repairing banks of a navigable river, as from time immemorial they had been uſed and ought, whereby the courſe of the river became obſtructed, and the plaintiff was obliged to carry his corn about: 2d count charging as above, and that thereby he had not ſufficient uſe of the navigation, *prout conſuevit & debuit.* Judgment for plaintiff affirmed on error. v. 556 to 558.

V. *Evidence.*

Deed.

On valuable conſideration ſhall be conſtrued liberally; eſpecially where on a marriage ſettlement, and in favour of iſſue. 33.

Held that the court would reject words or ſupply words to give effect to ſuch a deed, according to the *intent* apparent from the words and nature of the conveyance. 33, 34.

Difference between a will and a deed is, that technical words are required in a deed, which are diſpenſed in a will; but in *both* the *intent* muſt be *equally* preſerved. 34.

Deed of covenant in conſideration of marriage; eſtate for life to the huſband and wife; covenant to renew leaſes for the benefit of the iſſue, in which leaſes the name of the wife is always to be one during her life; and in caſe *either* of the *ceſtuy que vies* (the huſband and wife being two of the firſt) became ſick or infirm the huſband to renew ſuch leaſe or leaſes.

Determined that on the death of the huſband the executor ſhould renew, and ſo *toties quoties* during the life of the wife, the ſurvivor. 86.

Delivery of deed. v. *Delivery.*

You cannot go into evidence that a deed *abſolute* upon the face of it was in truth *conditional.* 457 to 460.

But there may be ſuch fraud as will vitiate it, *ab initio*, and this it ſeems would be good evidence on a plea of *non eſt factum. ibid.*

But if there is an agreement ſubſequent to the deed, or at leaſt not contained in it, though you cannot aver it againſt the deed, the court

court will let you in to have juſtice ſome other way. *ibidem.* v. *Conſtruction*, *Conſideration*, *Habendum*, &c.

Delivery.

Of declaration ſhould be to the attorney, and not to the party himſelf, where there is an attorney. 332.

Delivery of a deed may be by words or actual tradition of it. 340. v. *Feme*. 3.

Where goods countermanded by act of bankruptcy before delivery. v. *Bankruptcy*. 12. And *v.* p. 484, 487.

Deviation.

There is no certain line to be drawn what ſhall be deviation; but it depends upon the circumſtances. 421 to 423.

Deviſe.

Bad in original can never afterward be made good. 161.

Duty.

Vide *Letters*, *Taxes*, *Parliament*.

Ejectment.

Notice of ejectment muſt be fair and honeſt, and fairly and honeſtly interpreted to the tenant in poſſeſſion; otherwiſe it will ſerve only to inform the perſon who uſes it deceitfully that *nothing is ſo ſilly as cunning*. 53.

Embroidery.

Made up into wearing apparel, and ſeized on landing, held not within the ſtatute of 22 *G.* 2. ſo as to be liable to the penalty. 200 to 201.

A Table of the Principal Matters.

Entry.

Held to be neceſſary only to ſave a fine. 360 to 362.

Diſtinction between execution upon *meſne* proceſs and final judgment. 548.

Equity.

Vide *Specific Performance*.

Eſſoign Day.

Declaration on. *v.* 358.

Eſtoppel.

Suit againſt a woman by the name of *Clariſſa*: She puts in bail in that name; ſhe ſhall not plead, in abatement of the action, that her name is not *Clariſſa*, but *Clara*, *Elizabeth*. 82. v. *Abatement*, *Bankrupt*, *Fraud*. *Feme*. 3.

Evidence.

The beſt muſt always be had of which the caſe will admit. *v.* 328. 363.

Copy from the minute-book of the Houſe of Lords good evidence. 387. 428, 429.

Where a deed is *loſt* or *deſtroyed* without the fraud of the party who deſires to prove title under it, evidence ſhall be admitted of its contents in the beſt manner that it can, that there may be no failure of juſtice: But firſt you muſt prove ſuch a deed once exiſted, and is loſt; and you muſt prove contents, not identically indeed, but as well and truly as you can. 507.

Muſt agree with the declaration, in order to entitle to a verdict. 523, 524.

All evidence is to be weighed according to what is produced on one ſide balanced againſt what is produced on the other. 528. And to the ſubject to which it applies. 589.

The jury are to find the evidence, not the court. 573.

Preſumption is a ground of evidence, and therefore it is for the jury, but not the court. *ibidem*.

Examinations.

Where a conviction is removed by certiorari the juſtices are not ordered to return examinations; nor is it done but in the caſe of a coroner's inqueſt, where the court, as *ſupreme coroner* of the kingdom, does it. 348.

Exchange.

Eſtates paſſing in exchange muſt be reciprocally of *equal* quality. *v.* 416.
Cannot be between more than TWO *parties.* *ibidem.*
Bills of. v. *Bills of Exchange.*

Executor.

Payment of intereſt evidence of aſſets againſt an executor, but not *concluſive* evidence. 68, 69.
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Feme poſſeſſed of chattels *in auter droit*, as executrix, the huſband ſhall not take them by gift of law though he ſurvive her. 83.

Execution.

Never to be taken out but for what is actually and *bonâ fide* due. 280.
Of goods haſty and unreaſonable *diſallowed.* 52.
Levied by attorney after debt ſatisfied. Goods ordered to be reſtored with coſts. 84.

Exportation.

The exportation price of barley held to be determined by the price at the port exporting. 554.

Felony.

Taking out letters of adminiſtration to ſeamen upon falſe oath. 321.

Feme.

1. May plead without her huſband where the huſband is tranſported: For tranſportation is a temporary death. 142.
2. Warrant of attorney to confeſs a judgment given by a feme ſole; ſhe afterwards married: The court gave leave to enter up the judgment in the name of the huſband and wife. 329.
3. May *affirm* a deed which was *void*, being made during her coverture, and make it *good* when ſhe becomes *ſole* by *re-delivery*; or by *words* or *acts* of *affirmance*, without actual delivery. v. 763 to 766.

Feme ſole marrying between original proceſs and appearance. v. *Abatement*.

Vide *Coverture*, *Marriage*, *Revocation*.

Fine.

Fine levied by tenant for years is no bar to the freehold. 514.

Final Juriſdiction.

Where a ſentence is made final by act of parliament, or otherwiſe, it is to be underſtood with the reſerve if it be not palpably unjuſt or illegal upon the face of it. 189.

Where a ſentence has been paſſed not unjuſt or illegal but improper, by a court having final juriſdiction, another court, though ſuperior, may not ſet it aſide: But it will influence the diſcretion of the court when their aſſiſtance is aſked towards the execution of it. 190.

Foreign Judgment.

You can't bring an action upon a foreign judgment as judgment; but you may action of debt, and give the judgment in evidence. 148.

Foreign Laws.

Where a contract is made abroad, grounded on foreign law, the court here will receive evidence of that foreign law, and give judgment accordingly, on an action brought here in due form upon the contract. 154.

Fraud.

If a charge is *ſimple*, and the denial coupled with *circumſtances*, it is a great preſumption of *fraud*. 155.

The very title and ground of the ſtatute of frauds has been the reaſon of many exceptions from the letter. 331.

Every conſtruction of the ſtatute of frauds which would be good in *equity* will be good in *law*. 331.

The note of an agent will be the note of the party, ſo as to take it out of the ſtatute: Though the agent has not an *expreſs* authority to ſign, but a *general authority*. 332.

A falſe or colluſive action ſhall conclude againſt the parties to the fraud; but all the world beſides is permitted to controvert it. 427.

Fraud, in the legal ſenſe, is any act unwarranted by law prejudicial to third perſons. 476. v. *Bankruptcy*.

Vide more under *Inſurance*, *Conſequential Damages*, *Malice implied*.

Rules concerning fraud of two kinds; one to *protect* good and *innocent* people, at leaſt *comparatively* innocent to thoſe who have deceived them, by *reſcinding* FRAUDULENT agreements.

The other to prevent perſons dealing upon *equal* terms from falling into agreements *prohibited*, by *precluding* them from taking relief againſt ſuch contracts. 758.

Where the offence is *paris gradus* the defendant has the better ſide.

Whoever enters into an *illegal* contract does it *ſubject* to *all* rights known or *unknown* at the time, which are againſt the contract. 759. v. *Owner*.

Where a woman has paſſed as a married woman, and given herſelf out as ſuch, and been accordingly reputed, and has goods in the houſe of the man with whom ſhe cohabits, and is *oſtenſibly* his *wife*, and the goods *oſtenſibly his*, neither he nor ſhe ſhall ſay, upon the goods being taken in *execution* by a creditor for a juſt debt, that ſhe is *not* his *wife*, and the goods not *his*. 782 to 784.

Secret tranſfer of *moveable* goods *always* a badge of fraud. 784.

Game Act.

Keeping a greyhound, without *uſing* him for the purpoſe of deſtroying the game, not within the act. 179.

Going out with a qualified perſon not within the act. *ibidem*.

Gaming.

1. An evil too big for poſitive law. 152.
Well when both parties loſe by it. *ibidem*, and 153.
2. Securities on a gaming conſideration coming into the hands of a third perſon innocent, without privity, for a *bonâ fide* debt, are *yet* VOID. 755.
3. Inſurances on the chances of tickets coming up, prohibited. *v.* 776.

General Warrants.

Vide *Warrants*.

Grammar.

The *proper* and legal conſtruction of what is commonly called the *preterit* tenſe. 440.

Grandchildren.

Vide *Children*.

Habendum.

Limits, enlarges, aſcertains, and fixes the meaning of the premiſſes, but cannot *contradict* them. 191, 192.

Heir.

Cannot be of the *half* blood. 396 to 398.
Formerly this was otherwiſe, and the heir by the half blood, might inherit of lands by deſcent from the father, though not by purchaſe. 396. v. *Prerogative*.
The heir ſhall not be diſinherited but by neceſſary implication. Vide *Will et paſſim*, and v. *Implication*.

Holding over.

If an action be brought on the ſtatute for double rent for two years holding over, the jury may find for ſo much as, upon the evidence, the tenant appears to have overheld beyond the term, provided they find not *beyond* what is laid in the declaration. 276.

Houſe.

Every man's houſe is his caſtle. v. the caſe of *General Warrants.*
This maxim confined to thoſe whoſe *domicile* it is; for it is not the ſanctuary of a ſtranger.
Held that the privilege of the door belongs to the *outer* door, and not to the other doors, though of the ſeparate apartments of lodgers. 382.
The maxim not to be extended by any latitude of conſtruction againſt arreſts upon *legal* proceſs. 382.

Houſes.

Diſorderly, the ſource of evil, public and private. 275.

Implication. (Neceſſary.)

Explained to be a certain and undoubted implication; but not ſuch as left it ſtrictly *impoſſible* to be otherwiſe. 444.
Implication of malice. v. *Malice implied.*

Indictment.

Setting forth that on ſuch a day plaintiff was a juſtice of peace, and that the defendant at a ſeſſions holden at *B.* for the county of *A.* *then* and there ſaid ſuch words, bad for want of certainty of time. 129.
That *two* may be included in *one* indictment for an aſſault againſt *two*. v. 271.
Where in an indictment by the accidental omiſſion of a letter a *ſenſible* word is made *inſenſible*, though in the very *giſt* of the charge if the jury may be clear of the meaning, held that it ſhall not vitiate the indictment, otherwiſe when one word which *has* a *meaning*,

ing, though improper and nonſenſical in the place is ſubſtituted for another. 785, 786.

Injunction.

Does not determine the title or merits; but is to ſtay preſent waſte or miſchief pendente lite. 149.

Inſolvent Act.

A. owes money to *B.* and *C.* is diſcharged under the *inſolvent* act; and gives a note to *D.* truſtee for the benefit of *B.* this is no *extinguiſhment* of the old debt and creation of a new; but an additional ſecurity for the old: And the perſon of the debtor remains free under the benefit of the act. *v* 37.
Court never grants the inſolvents leſs than the *full* allowance, which is in their diſcretion by the ſtatute. 348.
Where a perſon has a beneficial poſt though not ſtrictly aſſignable, he ſhould do his beſt to diſpoſe of it before he claims the benefit of the inſolvent act. 348.
Serjeant of the militia does not ſeem to be a place within the inſolvent act. 349.
Time of payment on *Monday*, is put by way of inſtance in the act; another day will do, provided it be weekly. 349.
Debt *due* before diſcharge, but to be *paid* after he is diſcharged by the act. *v*. 433, 434.
It ſeems the place of waiter to the commiſſioners of the cuſtoms, is not within the act. 436. *ſed quære*.
Held that attachment for non-payment of coſts in a criminal ſuit on 5 *W*. *M*. *c*. 11. was diſcharged by the inſolvent debtors act. 650.

Information.

Court will not grant information upon *doubtful* evidence. 65.
Party applying for an information againſt another, ſhould come with pure hands. 73. v. *Maxims*. *v*. 148.
The court will not aſſiſt a complainant in an extraordinary way, where he has been obliged to do that juſtice he ought to have done himſelf, though irregularly obliged, and has been the cauſe of the act complained, and it does not appear to have been done *malo animo*. 147.
Not proper to be granted in the caſe of a very poor perſon. 155.

Not proper to try a civil right; unleſs the parties ſtand out againſt a trial at law. 184.

Court will not grant an information when the matter charged, if proved, will amount to a felony which ought to be tried in the courſe of common-law. 253.

He who applies for an information muſt not have lain behind. 273.

Upon a motion for an information, the original papers ſhould not be annexed to the affidavit; but a copy.

Court will not grant it where information is offered under falſe or ambiguous colours; where the words fairly admit a favourable interpretation; where the complainer comes late; where he comes equally chargeable; where the party charged is ſo poor that he would be overborne by the expence; where the matter itſelf is not of importance, for public example in an extraordinary manner. *Vide* the places cited above, and p. 393, 394.

Will be granted againſt papers publiſhed to prejudicate a cauſe. 465.

Inſurance.

Where a perſon inſures and afterward the veſſel is loſt, and he writes after the loſs to encreaſe the inſurance, and the letter is dated on a night where no poſt goes out from the place, and the next day in the public papers of the place, the loſs appears, and the perſon applying to increaſe the inſurance, does not withdraw the letter nor give notice of the loſs, this is ſo ſuſpicious, that in a caſe with theſe circumſtances where there had been a verdict for the defendant, who obtained the increaſed inſurance, the court granted a new trial. 212, 213.

In *November* 1772, *A.* chartered the ſhip *Thomas* and *Matthew*, and agreed to freight her for *Seville*, and back again.

The plaintiffs and many others ſhipped a cargo on board and *inſured* the ſame, with proviſions againſt loſs by ſtorms and perils of the ſea, &c. and againſt *barratry*. In the policy it is declared, that it ſhall not be void by reaſon of any *flaw* in the veſſel *unknown* to the aſſured.

The ſhip ſailed in *December* 1772, and went to *Guernſey*, where the captain took in a quantity of brandy, which he meant to *run* by way of clandeſtine trade; the night following they ſprung a leak, which drove them into *Dartmouth*, from whence they went to— in *Cornwall*, where the brandy was *ſeized* by the authority of the cuſtom-houſe.

By the bad weather, &c. the ſhip was rendered unfit for the voyage, which had been partly proſecuted after putting into *Cornwall*.

The parties came to an agreement that the inſurance ſhould continue, and protect the goods in their return to *London*.

The *goods* were *ſpoilt* whereupon this action was brought.

Three counts were laid.

Firſt of damage to the ſhip by ſtorms, *&c.* whereby the goods were ſpoilt.

2d. Of the ſhip ſpringing a leak in her voyage from *Dartmouth*, whereby, *&c.*

3d. That by the fraud and *barratry* of the maſter the *goods* were ſpoilt.

The underwriters contended that this was only a ſimple *deviation* of the captain, not *fraudulent* as againſt the owners, and was neither merely *accidental* nor *barratry*, being no fraud againſt the owners.

The inſured inſiſted that it was either accidental loſs, and then they were entitled to recover under the general terms of the inſurance againſt ſtorms, *&c.* or elſe it was barratry.

It came out upon the trial, and was found by the jury under the direction of the judge, that the voyage of the captain to take in the brandy was *with* the *privity* of *Willes* the owner of the hulk, but *without* the privity of *Darwin* who *chartered* the veſſel.

And they found a verdict for the plaintiffs.

On a motion for a new trial, the court was of opinion that the verdict was *right*.

What was charged on the captain and found, it was agreed, could not have been *barratry* as under the inſurance, if it had been with the privity of the owner, for he ſhould not have *recovered againſt* his *own order* or *conſent*; but that here *Willes* was *not* the owner; but *Darwin* who freighted under the charter party was the *owner*, *pro iſtâ vice*.

That *barratry*, in the general ſenſe of commercial nations, and in our books as far as it had been touched, ſeemed to mean ſomething *fraudulent* or criminal, whereby the intereſts of perſons concerned in the voyage or in the ſhip were prejudiced;

But that it was not neceſſary it ſhould be a fraudulent or criminal act intended againſt the perſons who ſuffered; it was enough if it was a *fraud* and a *crime*, and they ſuſtained damage, though the damage not intended againſt them;

And farther (though Mr. Juſtice *Willes* ſeemed to doubt, but agreed the ſubſtantial merits were anſwered and ought not to be diſturbed) the court was clearly of opinion that the ſupervenient damages need not reſult directly and immediately from the criminal act, but that *all* damages afterwards happening, which might by any poſſibility otherwiſe not have happened, ſhall *relate* back to the *original* fraud, and be imputed as its conſequences. *v.* 631 to 648.

Irrelevancy.

Opprobrious words, ſpoken by party, counſel or witneſs, *irrelevant* to the cauſe, will be puniſhed. 56.

Irregularity.

May be waived if you continue the proceſs on the other ſide, as if it had not been committed. 236.

On a common appearance, proceeding to plead admits regularity of the appearance. 237.

You ſhould complain of it on the firſt opportunity. 323, 333.

Where there had been an irregularity, and the party who ſuffered by it came late and without merits complaining of ſurprize, the court diſmiſſed the application, telling them that they came out of ſeaſon, to inform the court they were ſurprized into doing juſtice. 333.

Where a bill is filed againſt one as attorney of *B. R.* who is attorney of *C. B.* this ſeems *error*, and not *irregularity*. 653.

Judge.

Words ſpoken by a juſtice of peace to a grand jury very improper, not ſubject to an indictment becauſe ſpoken in the execution of his office; but if he had been a county juſtice, they might have been a ground to apply to the great ſeal to remove him from his office. 56.

Words ſpoken by a judge in the execution of his office are not actionable. 56.

Judgment.

Where there are two defendants convicted under the ſame indictment for the ſame offence, the court will not proceed to judgment againſt one ſeparately, unleſs the other cannot appear by any reaſonable intendment. 44.

Suffering judgment by default, admits the fact and the law to be againſt you; and you cannot offer affidavits in denial or juſtification, but you may to extenute and mitigate. 82.

Judgment in *Ireland* upon a bill of exceptions; held that it ought not to have been given; but when given the court would not reverſe it. 34.

Judgment foreign. *v Foreign judgment.*

Judgment of *B. R.* and execution thereon ſet aſide, the plaint in the writ being laid "*before our juſtices* at *Weſtminſter*," whereas it ought to have been "*before ourſelves* at *Weſtminſter* or whereſoever, *&c.*" *p.* 184.

Of corporal puniſhment not to be pronounced againſt a perſon in his abſence. 400.

Judgment relates to the firſt day of the term. *v.* 654.

Judgment Interlocutory.

A regular judgment not to be called a ſnapping judgment where there is no fraud. 145.

Jury.

Juryman put upon the pannel above eighty years of age, diſcharged by the court. 213, 214.

Juſtices of Peace.

The court will not ſuffer them to be harraſſed under colourable pretences. 38 to 42.

But where any thing *doubtful* appears in their conduct, though the court in a *doubtful* matter will intend *favourably* for magiſtrates in the truſt of public juſtice, they will not puniſh the complainant with coſts. *v.* 42.

Not protected by law in acts done under *pretence* or colour of office. 243.

A juſtice may commit on *complaint*, but in ſtrict form the complaint ſhould be in writing. 243.

He may commit on his view without complaint, if he has reaſon to apprehend the peace *will* be broken, though not actually broken. 243.

All officers acting under a juſtice's warrant, within the juriſdiction of the juſtice, are within the protection of the ſtatute 24 *G.* 2. *v.* 252.

They muſt ſhew a juſt and reaſonable cauſe for refuſing licences. 315.

May plead the general iſſue to actions brought againſt them, and give the ſpecial matter in evidence; and if verdict is for them they ſhall have double coſts. 373.

A man who acts as attorney ſhould not act as juſtice of peace; but this extends not to charter juſtices. 620.

For more concerning the juriſdiction of juſtices v. *Bridges. Conviction, &c.*

Latitat.

Perſonal ſervice neceſſary in the firſt proceſs in latitat. 253.

Larciny.

If after goods are *ſold*, and earneſt or the whole ſum paid, a perſon takes out part, though before actual delivery to the buyer, or to any to convey to him, this is grand or petty larciny, according to the value taken out, though the goods may be remaining in the warehouſe of the ſeller: For, after the *ſale* is *completed* by *earneſt* paid, the *poſſeſſion* of the *ſeller* is the *poſſeſſion* of the *buyer*. 601, 602. v. *Trover* and *Specific Performance*.

Leaſe.

From the firſt of *June* for three years *begins* on the ſecond and *ends* on the firſt. 276.

Leſſee.

If leſſee hold over after notice from the landlord that in caſe of holding over beyond the day in the notice he ſhall pay an encreaſed rent, the holding over is an aſſent to the new rent, and the landlord ſhall recover it in an action for uſe and occupation. 154.
Vide *Holding over*. v. *Rent*.

Legacy.

Double.
Where a leſs ſum is given by will, and afterward a greater by codicil, or in general a leſs ſum by one inſtrument and a greater by a ſubſequent, as where there are two codicils, and different ſums given in both to the ſame perſon, the preſumption is in favour of the deviſee as to both: And if the heir would take either ſum from the deviſee he muſt *prove* an *ademption* of it; and ſo it ſeems if a greater ſum be given firſt and afterwards a leſſer. Otherwiſe where in the *ſame* inſtrument, or *equal* ſums in *different* inſtruments;

ſtruments; for then the proof lies on the deviſee that both were bequeathed. 130 to 133.

Letters.

Where there is a poſt-town that *town* conſtitutes the *limits* of delivery; and the maſter of the office there is bound to deliver letters to all perſons *within* that town. And he cannot charge any thing beyond what is provided by the act of parliament. 753 to 755.

Vide *Parliament*.

Libel.

Where being in cuſtody is not an excuſe. 778 and 780.

That publiſher is ignorant of the contents goes for nothing. 544. It may indeed on circumſtances be a mitigation, but it cannot *juſtify* to the action. 762, 763.

The impotence of the libel, both in the writing itſelf and in the ſtrength of the characters it attacks, is no excuſe for it. 778.

A libel on King *William* and Queen *Mary*, eſpecially as inſtruments of the revolution, is puniſhable now. 778.

If the meaning is clear to the jury, miſdating of facts or omiſſion of letters in words will not make it leſs a libel. 778. *v.* 780.

Liberty.

For violation of liberty no price is a compenſation; whether it be by confining a perſon, or beating, wounding, or otherwiſe ill treating him, in his body or reputation, which he has a right to enjoy freely, or by oppreſſing him and depriving him of his juſt rights, in any kind. *v.* 774, and v. *Damages*, *Libel*, *General Warrants*, *Maxims*, &c.

The laws of this country will not endure the violation of liberty in the perſon of a ſtranger, no, nor of a ſlave reſident here; for they know not ſlavery, nor ſuffer it to breathe in the air of *England*. v. *Negro*, and the exception of villenage, now obſolete.

Limitation of Time.

A year obſerved to be the common limitation in penal ſtatutes where a moiety goes to the informer and a moiety to the poor. 330.

Vide *Statutes of Limitation*.

Literary Property.

Vide *Abridgment*.

Madhouſes.

Private, not authorized by law (*note*, this was before the late act). The keepers of them excuſed by acts of neceſſity under the judgment of proper perſons in a proper manner. 73—75. 79.

Madman.

Any man may commit a perſon who, under the viſitation of God, is a lunatic furiouſly mad, to prevent miſchief. 243.

But the *removal* of a lunatic is under a ſpecial power given to two juſtices. *ibidem.*

Malice.

Implied. What it is, and it's conſequences. *v.* 645. and v. *Inſurance.*

Majority.

The majority at common law is not of the whole body, but of thoſe preſent. 266.

Mandamus.

Will not be granted to do that which is likely to be done without it by conſent. 148.

The court refuſed to grant a mandamus to admit a *deputy* pariſh-clerk. 434.

Mandamus will go to reſtore a perſon removed from a freehold before it was competent to remove him. 551.

Marriage.

Bond with penalty engaging not to marry any but the obligee void, becauſe againſt policy and reaſon; the obligee not engaging to marry

marry him. 345. *v.* the caſe of *Long* v. *Dennis,* in Sir *James Burrow*'s Reports, publiſhed ſince the page was printed which is referred to in the note above, and particularly ſee 2055 to 2057. And *vide* alſo the caſe of *Lowe* and *Peers.* 2225 to 2234, which ſeems the very caſe meant.
Vide *Feme.*

Maſter.

Maſter may juſtify in aſſault that he interpoſed in defence of his ſervant, whom the plaintiff was beating; for the duties of the relation are reciprocal. 215, 216.

Maſter and Fellows.

Diſputes concerning election to be tried in the King's court. *v.* 25.

Maxims.

No man ſhall be a judge in his own cauſe. 63.
Extreme niceties very proper in furtherance, very bad in hindrance of juſtice. 70. v. *Table of Maxims.*
Qui peccat in ſyllaba peccabit in tota cauſa is not to be taken generally, and it is leſs to be admitted in civil cauſes than in criminal charges, and leſs in civil upon the defenſive ſide, which is favourable, than upon the adverſe, in which greater nicety ſhould be uſed. 146.
1. *Apices juris non ſunt jura.*
2. *Summum jus ſumma injuria.* v. 327, 328.
3. LIBERTAS NON RECIPIT ÆSTIMATIONEM.
4. *Ceſſante cauſâ ceſſat cauſatum.* 401.
5. *Nemo lucrabitur de injuriâ ſuâ propriâ.* v. 645.
6. *Allegans turpitudinem ſuam non eſt audiendus* to be taken in a reſtrained ſenſe. *v.* 342. 757, 758.
Vide *paſſim,* and v. The *Table of Maxims.*

Merchants.

Cuſtom of, part of the general law of nations. 639. v. *Inſurance.*

Morality.

Whatever offends againſt the order and good morals of ſociety is an offence againſt the law of *England*, and puniſhable at common law. 385.

Mortgage.

Ejectment by mortgagee not conſidered as adverſe againſt the tenant. 364, 365.

Motion.

What regularly is to be had on plea ought not to be taken upon motion. 65.

What is hard and unfavourable, in a view to conſcience and equity, the court will not ſuffer to be taken upon motion. v. *Gaming*, 2. and v. *Coverture*.

Naval Stores.

Vide ſtatutes concerning, and v. *Broad Arrow*.

Negro.

Cannot be ſent out of the kingdom of *England* againſt his will. 19.

New Trial.

Will not be granted in every caſe where the verdict is againſt evidence. 146. 391. 457. 529.

To grant a new trial ſuppoſes at leaſt that the verdict was againſt evidence, or the evidence improper to have been laid before the jury. 158.

Upon a *new* diſcovery never too late to move, if you apply in regular time *after* the diſcovery. 160.

Inſufficiency of counts ground for arreſt of judgment; not of new trial. 371.

Ought not to be granted where the charge is of a *criminal* nature, and the defendant has been *once* acquitted. 451.

The court will not grant a new trial where the jury have found againſt the form, though they have been *wrong* in ſo doing, if they have found according to the merits and ſubſtantial juſtice. 521.

Non-Reſidence.

Sequeſtration of the benefice no excuſe. 602, 603. v. *Statutes*.

Notice.

Name of plaintiff's attorney not inſerted in notice of a writ of latitat vitiates the notice. 58.

A *motion* for judgment, as in caſe of a nonſuit, upon the 14 *G.* 2. *c.* 17. held to be notice within the ſtatute. 265.

If no body can be found on whom to ſerve notice of ejectment you may ſtick it up at the door. 266 and 272.

Of ejectment, held good at the houſe, though the premiſſes lay in another county. 301.

Held that where there were joint owners notice ought to be ſerved upon both; at leaſt where they lived in ſeparate houſes. 301.

Of declaration in ejectment not to be delivered to ſervant of *inſane*, but to committee. 401.

Nuſance.

A man ſhall not have a *private* action for a *common* or *public* nuſance. 556.

Order of Niſi Prius.

Explanatory words not to be added to the order when it is made a rule of court; but if neceſſary they muſt be made a ſeparate rule. 151.

Order of Seſſions.

Application to remove by certiorari within what time. 544.

Original (Writ.)

Suit by, where *bad*. 52.

Ouſter. (Actual.)

Held that it may *preſumed*. 768. v. *Tenants in common*.

Outlawry.

When you come to *reverſe* you muſt have the *record* in court. v. 348.

Vide 370.

Perſonal appearance not neceſſary to reverſe, except in treaſon and felony. 372. 520, 521.

Error in fact the attorney-general may be permitted to allow, though the error alledged be not true; otherwiſe of error in law. *v.* 521.

Owner.

Wherever the *lawful* property may be *identified* and *traced* out the owner ſhall come and recover, when the thing has been *unlawfully* converted and changed: For though the *poſſeſſion* has been *changed* the *property* is *not*. Nor will ſeizure into the hands of the crown, in ſuch caſe, be a bar. *v.* 759. and *Trover*. 2, 3.

Parent.

If the *father* appears improper to have the *cuſtody* of the *child*, and the *child* be of too *tender* years to *chooſe* for itſelf, the power of the court of *B. R.* is *diſcretionary* in aſſigning the cuſtody of the child. 749.

The power of the parent is *ſubordinate* to the power and authority of the ſtate, in education of the child, as in other reſpects. 749.

Pariſh-Clerk.

It ſeems appointment of pariſh-clerk needs not to be in writing. 434.

Parliament.

Motion to ſtay proceedings till the event of a petition touching the cauſe depending in parliament refuſed. 436.

Powers derogatory to private property, though by act of parliament by one's own repreſentatives, to be very ſtrictly conſtrued, and not extended. 442.

No man can demand a duty without an act of parliament. 754. v. *Letters.* v. *Taxes.*

Partnerſhip.

Every partner is liable jointly and ſeverally 82.

Patent.

It does not ſeem to hold true that a patent cannot be granted for a new invention ſuperadded to an old one. 395.

Pauper.

Conviction of return of pauper ſhould appear to have been by confeſſion, oath, or view of the juſtice himſelf; and it ſhould appear that he returned without certificate. 84.

Peerage.

Privilege of peerage will be noticed without pleading. 49.

Penal Action.

Vide *Tythes.* v. *Statutes.*

Peremptory.

A peremptory is always underſtood ſo as to be without prejudice to juſtice. 262, 263.

Perjury.

Muſt not only be a falſe ſwearing upon oath, and in a court having authority to adminiſter an oath, and in a matter which is material to the cauſe, but it muſt be a *wilful* and *deliberate* falſe ſwearing: For if a man in the hurry of evidence, or from defect of memory, ſwears falſe, by *error* or *ſurprize*, this is not perjury; for there muſt be the *mind* of ſwearing falſe to make it *perjury*; and then it will be *perjury*, even if a man ſwears to a *true* fact, if it can be proved that he believed it to be *falſe*.
Vide 773. *et alibi*.

Pew.

In preſcribing for a pew it is not neceſſary to alledge that he and his anceſtors have always been accuſtomed to repair; for it is only evidence: And perhaps the pew never wanted repair. 423.

Plaint.

Defendant ought to remove with *cauſe*; plaintiff may *without*. 520.

Pleading.

Action againſt a tenant for breach of covenant in not repairing the demiſed premiſſes. Plea that the landlord did not aſſign him materials—*bad*; for he ſhould have ſhewn that he aſked: And ſo plea that there were none proper to which he had a right; for this is putting the iſſue not upon the *fact* but upon the *law*. 43.
Plea of *riens per deſcent*, how given by the ſtatute. *v.* 264.

Plea.

It ſeems to be the practice that delay to demand a plea does not hinder your ſigning judgment the inſtant after you have demanded it. 333.

Poſſeſſion.

Long, the effects of it. 315.

Poſſeſſion is very favourable as a rule of certainty and an evidence of right, and for quieting of diſputes. 332.

Poſſibilities.

Aſſignable under circumſtances. *v.* 43.

Poſthumous.

Held that the ſtatute of *W.* aids only in caſe of remainders. 398.

Poſt-Office.

Vide *Letters*, and v. *Statutes*.

Powers.

Expreſſion of what the law implies though not expreſſed, in the deed under which the powers are derived, or by which they are reſerved; ſhall not prejudice the execution of powers. 319.

Preamble.

Vide *Statutes*, *Conſtruction of*.

Prerogative.

The rule that the half blood ſhall not inherit does not affect the ſucceſſion to the crown. 398.

Will never prejudice juſtice, or the rights of the ſubject. 90.

Preſcription.

Cannot be where the creation of the thing in which it is claimed is within time of memory. 76, 77.

Preſumption.

Held that putting in the name of a *nephew* in a leaſe renewable for lives carried *prima facie* a preſumption only that his name ſtood as truſtee; but that this might be repelled by parol evidence, ſhewing that he was intended to take for his own benefit. 230 to 232.
Preſumption from non-payment of intereſt upon a bond is within no ſtatute of limitations; but will depend upon circumſtances and evidence. 320.
Of right of ſoil in an highway through a manor held to be in favour of the lord. 358. But it is not concluſive. Where there are owners of each ſide, and no body can ſpeak to the antiquity of the road, or the property, the preſumption changes, and is in favour of the owners on each ſide. 358 to 360.
Preſumption that he who has ſeparate fiſhery is owner of the ſoil. 364.
On a writ of right that may be a preſumption which is not a bar.
Preſumption of ſatisfaction by diſcontinuance on elegit. 651.
Every thing (not contrary to the known fact) is to be preſumed againſt a perſon who will not ſhew his title. 523.
Vide *Evidence*.

Priſon.

The court of *B. R.* has power over *all* the priſons in the kingdom; and they are all of them the priſons of the court. 436.

Privilege.

Of a member of parliament. *v.* 156.
Of a party or witneſs attending proceſs in going, continuing, and returning; and this protection afforded a lady, brought up by habeas corpus, againſt her huſband. *v.* 434, 435.

Prohibition.

Where the foundation and principal ſubject of the ſuit is an *eccleſiaſtical* matter, and the temporal right only an *incident*, the eccleſiaſtical court ſhall proceed as long as they will try the matter as the common law would have done in ſuch caſe, in reſpect of that which is temporal (for there is no defect of original juriſdiction); but

but if they refuſe to try it as the common law would have it tried a *prohibition* ſhall iſſue.

Property.

Vide *Owner*.

Re-Entry.

Shall only operate as a ſecurity for the rent. 319.

Relation.

Vide *Judgment*.

Remainder.

Croſs-remainders may be between more than two where the intent is plain. 112.

Between two the *preſumption* is in *favour* of *croſs* remainders; between *more* than *two* preſumption is *againſt* them: But either may be repelled by evidence of *intent*.

Reporters.

The concurrent teſtimony of reporters, be they good or bad, is of great weight. 420.

Republication.

A codicil with three witneſſes, and theſe words, "I deſire this may "be taken as part of my will," amounts to a republication of the will. 608, 609.

A. has lands in *A. B.* and *C.* which he deviſes; afterwards he purchaſes lands in *D.* and makes a republication of his will. This can have no effect on the after purchaſed lands in *D.* where he had *none* at the making of the will. 609. v. *Revocation.* 6.

A. makes his will, with a general reſiduary clauſe; and AFTERWARDS is admitted in fee to a copyhold eſtate, which he *ſurrenders* to ſuch uſes as he SHOULD by his laſt will and teſtament direct, *&c.*

AFTER the ſurrender he makes a CODICIL, atteſted by THREE witneſſes, and having thereby given an annuity and his houſe and furniture at *H.* to Mrs. *C. D.* he goes on, "And I do *ratify* and "*confirm* all the deviſes and bequeſts which I have made in my "laſt will and teſtament, except what I have hereby altered: And "I do direct that it may be annexed and taken as a codicil to my "will."

He had *no* copyholds at the time of making the will.

Held a REPUBLICATION by the ſtatute, the codicil being ſubſcribed by THREE witneſſes. 752.

Reputation.

Vide *Damages*, *Libel*.

Reſtitution.

Vide *Trover*. 2.

Return.

Of two *nihils* and judgment thereupon is not good without real notice, where it is to charge an executor with aſſets. 305 to 313.

The court not ſo ſtrict upon the returns of inferior courts as formerly. 431.

Diſtinction between returns on *meſne* proceſs and returns in execution. 332, 333.

Reverſion.

Powers given under a ſettlement to make leaſes of preſent and not of future intereſt, and ſo as the ſame go with and be incident to the remainder and reverſion. Reſervation, with a view to the execution of theſe powers, held good, being made to the tenant in poſſeſſion of the freehold, his heirs and aſſigns: For that, both by reaſon and authorities, heirs and *aſſigns* meant thoſe to whom the remainder and reverſion ſhould go under the ſettlement. 319.

Revocation.

1. As to *make* a will there muſt be *animus teſtandi*, a mind and intention to make, ſo to *revoke* a will there muſt be *animus revocandi*, a mind and intention to revoke. And though ſince the

ſtatute

ſtatute a will can neither be made nor revoked without performance of the requiſites preſcribed by the ſtatute, yet *all* the forms of making or of revoking muſt be accompanied by a ſound and free mind (ſo far free as to be under no compulſion, terror or deception, as to the act done, in the doing of it): And there muſt be an intention in the teſtator, in making or revoking his will, to make or revoke; which muſt in both inſtances *accompany* and *direct* the *form* to make either a *good will* or a *good revocation*. 470, 471.

2. A *revoking* will *revoked* ſets up the former, as a repealing ſtatute repealed. 575, 576.

3. *A.* deviſes eſtates in ſtrict ſettlement; he afterwards makes a *new* contract, and then by his codicil paſſes the eſtates purchaſed under that contract to the ſame uſes.

After this he unites the *equitable* eſtate which he had before by truſtees to his uſe to the *legal* eſtate, by making an abſolute purchaſe to himſelf in fee. This is not ſuch a *change* of eſtate as will operate a revocation. 609 to 617.

4. Conſtructive revocations againſt the intent ought not to be indulged: And ſome deciſions of that ſort, miſunderſtood, or overſtrained, have brought a ſcandal upon the law. 614. *v.* alſo 293 and 297.

5. *A.* declares his will void *unleſs* he return from *Ireland*; held that it was not revived by his return, but required a poſitive republication to ſet it up.

So when a feme ſole makes her will and *marries*, the act of marriage *merges* her will, and it does not revive by the death of her huſband without *republication*. 667.

Of revocations on change of eſtate by act of law. 299.

Marriage, with birth of a child, held a revocation. *v.* p. 171. *v.* the caſe of *Chriſtopher* v. *Chriſtopher*, mentioned in 4 *Bur.* 2171, and again 2182, to have been determined by Lord Chief Baron *Parker*, Mr. Baron *Smythe*, and Mr. Baron *Adams*, *diſſentiente* Mr. Baron *Perrott*; and afterwards to have had the concurrence of Sir *Eardley Wilmot* and Lord Chief Juſtice *De Grey*, that marriage and a child is a revocation of lands, which is ſtronger than of perſonalty. Of *perſonalty* there are ſeveral caſes, as *Lugg* and *Lugg*, *Overbury* and *Overbury*, and *Eyre* v *Eyre*, that marriage and iſſue are a revocation: For which v. 4 *Bur.* 2169.

[*Note*, The caſe of *Glazier* v. *Glazier*, when I ſent the note to the preſs, mentioned 575, 576, and in this table, was not then publiſhed by Sir *James Burrow*, I believe. But it is in his fourth volume. 2512 to 2515.

River.

A navigable river is the king's highway for the uſe of himſelf and his ſubjects. 556.

Rules of Practice.

It ſeems four days to put in bail mean *excluſive* of the return day: And if the laſt day is a *Sunday* then the whole of *Monday*. 190.

If time of exception againſt bail is out, and you have not juſtified, you cannot juſtify after the time allowed; but you may avail yourſelf to ſtop an attachment againſt the ſheriff. *v.* 224.

New trial to be moved within four days. 230.

A perſon who refuſes to admit evidence which is only formally neceſſary to be ſhewn incurs coſts. *v.* 248.

When a rule is made abſolute you can't anſwer it, but muſt move to have it diſcharged if you want to be clear of it's effect, and have ſufficient grounds. 265.

There muſt be exceptions from the literal meaning of every rule, where the letter would work an injuſtice, or contradict the ſpirit of the rule: And therefore the court refuſed to diſcharge out of cuſtody, for want of proceeding againſt a priſoner within two terms, where there was a miſtake by two being of the ſame ſurname. 274.

Time of trial will be enlarged where a witneſs cannot be come at, and the other party, though the witneſs was abroad before the action commenced, and not returned ſince, refuſes to admit the effect of his evidence.

Not to have a *non-precedendo* for want of tranſcribing; till you have firſt a certificate there is no tranſcript. 329.

No ſpecial arguments to be entered the laſt paper day of the term. 370.

When you move for a rule to ſhew cauſe the day before the laſt of the term the rule muſt be drawn ſpecially for the laſt day. 436.

Rules deſigned to prevent fraud ſhall never be applied to the purpoſe of effecting it. 622.

When the ſheriff is ruled to bring in the body he has four days *excluſive*. 631.

Vide alſo 653. and v. *Amendment*, *Notice*, *Declaration*, *Plea*, *Judgment*; *Sheriff*, *New Trial*, *Caſes*, *Superſedeas*, &c.

Scandalum Magnatum.

A peer may lay his action for this offence againſt him where he pleaſes: But on juſt ground of ſuſpicion that there cannot be a fair trial the venue ſhall be changed; otherwiſe not. *v.* 210, 211.

Servant.

Shoemaker employs a man to make up ſhoes for him, and retains him by the piece, and this perſon being hired by another, and leaving his former ſervice, the work unfiniſhed, an action will lie (though not on the ſtatute of *Eliz.*) for ſeducing him from that his former ſervice. 493 to 495.

Settlement.

Marriage. v. *Deed, Conſideration.*

Pariſh hiring from ſtatute fair to ſtatute fair ſeems a good hiring by the year to gain a ſettlement. 54.

Sheriff.

Anſwerable for the acts of his deputy. 81.

Return *non eſt inventus* with the name of ſheriffs of the laſt year is a *falſe* return by the ſheriffs of the preſent. 83. v. *Return*.

Indemnity given for a year to ſecure the ſheriff againſt the acts of his bailiff. Afterwards the perſon undertaking gives notice, diſliking the perſon employed, that if the warrants are delivered to that perſon he will not abide by his indemnity, this notice left at the office of the under clerk to the under ſheriff. Held that the ſheriff was not bound: And that the perſon who had given this indemnity could not diſcharge himſelf, unleſs by the conſent of thoſe in whoſe behalf it was given. 225 to 228.

Not entitled to poundage if judgment irregular. 253.

His return not traverſable; but you may have action for falſe return. 371.

Not entitled to poundage till the goods are ſold. 333.

Slander.

A woolcomber not ſtated to be a labourer muſt be intended to buy wool, and to be a trader. 322.

Declaration, *whereas* he is a woolcomber, and a perſon had agreed with him for a certain quantity of wool, the defendant well knowing, *&c.* and intending, *&c.* ſpoke of him (laying a *colloquium*) " he, *innuendo* the plaintiff, is not worth a penny, and " he will run away." The court ſeemed to think the declaration

tion ſufficient, and the words actionable, and would not take away from the plaintiff the benefit of the verdict in his favour. 322, 323.

Slavery.

Cannot be ſupported by moral or political reaſons; and in this country can be no further maintained than *poſitive* law will ſupport it. *Somerſet's* caſe. p. 19.

The only ſpecies of ſlavery which can now exiſt in *England* is, if a man will confeſs himſelf a villain in groſs in a court of record. *v.* p. 12 and 19. v. *Villenage*.

A ſlave in another country is not a ſlave in *England*; and the judges will not from analogy to any ſpecies of ſlavery that ever did exiſt in *England*, conſtrue him to be a ſlave in a certain qualified degree; for this country knows of no ſlavery in any degree not expreſsly limited and preſcribed by the poſitive law of *England*. p. 17 to 19. v. *Contract*.

Specification.

Vide *Patent*.

Specific Performance.

Equity will not decree upon a bare agreement by *parol*, not in part performed though it appear ever ſo *clearly*. 808. unleſs upon the ground of fraud. 814.

Part performance is not the tendering of conveyances, but it muſt be ſome act done as *in actual execution* of the contract; not *towards* the execution. 813.

(Letter) I will give 16500*l.* Anſwer—I will not take leſs than 17000*l.* Anſwer returned, I will give 17000*l.* This is not an agreement *executed* in writing within the ſtatute of frauds. *v.* 786 to 814.

The time of payment is very material, and where the time has been overpaſſed, equity will not aſſiſt the perſon who has overpaſſed it in his demand of a ſpecific performance. 813.

Where circumſtances are greatly altered ſince an agreement, equity will rather leave the party injured by non-performance to his damages at law, than decree a ſpecific performance.

If you read the confeſſion of an agreement by anſwer, you muſt read all relative to the agreement. 789.

Where an agreement appears in notes or letters, or by confeſſion in defendant's anſwer, the court frequently enforces the ſpecific performance;

formance; but then it muſt appear *fully* and *completely*, ſettled in all points. 801.

Where a perſon has declared he will not ſell to ſuch an one but for ready money, and another clandeſtinely attempts to purchaſe for the perſon ſo refuſed, and the money is not ready; ſuch tranſaction *is fraudulent*, and the court will not inforce the performance of an agreement ſo obtained. *v.* 786 to 814.

Payment of earneſt or delivery of poſſeſſion of part, comes under the idea of part performance. v. 809 and v. *Trover*.

Stamps.

Vide *p.* 155.

Want of ſtamps does not *avoid* a deed; but only hinders it's being given in evidence until ſtamped. 341. v. *Statutes concerning bills of exchange.*

Statutes.

General Rules of Conſtruction.

1. Statutes on the ſame ſubject are to be conſtrued together. 371.
2. The conſtruction of private acts of parliament is to be governed by the principles of common-law, applied to the ſubject in a manner analogous to the rules of interpretation in a private deed or conveyance. *v.* 416.
3. Preſumption of a general meaning not expreſſed, nor naturally implied, is very unfavourable and not to be received, at leaſt upon a penal ſtatute. 534.
4. *In favour of the liberty of the ſubject ought to be liberally conſtrued.* 650.

Though the preamble be generally a key to the ſtatute, yet it does not always open all the parts of it, but ſometimes the legiſlature having a particular miſchief in view to prevent, which was the firſt and immediate object of the ſtatute recites that in the preamble, and then goes on in the body of the act, to provide remedy for general miſchiefs of the ſame nature, but of different ſpecies not expreſſed in the preamble, nor perhaps then in contemplation. 783.

Concerning bail and bail-bond. v. 4 & 5 *Ann.* p. 395.

Bills of exchange. v. 5 & 6 *W. & M. c.* 21. *ſ.* 5. 9 & 10 *W.* 3. *c.* 17. 3 & 4 *Ann. c.* 9. *ſ.* 4.

Concerning building. 12 *G.* 3. *v.* 330.

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Againſt fraud 21 *J.* *c.* 19. *ſ.* 11. 29 *Car.* 2. *c.* 3. 13 *Eliz.* *c.* 5. 10. 20.

Vide 30 *G.* 2. *c.* 4. v. p. 271. of the abuſe made of this ſtatute againſt gaming. v. 12 *R.* 2. *c.* 6. 11 *H.* 4. *c.* 4. 17 *E.* 4. *c.* 3. 33 *H.* 8. *c.* 9. 2 & 3 *P.* & *M.* *c.* 9. 16. *Car.* 2. *c.* 7. 9 *A.* *c.* 14. 2 *G.* 2. *c.* 28. *ſ.* 9. 12 *G.* 2. *c.* 28. 13 *G.* 2. *c.* 19. *ſ.* 3. 18 *G.* 2. *c.* 34. 25 *G.* 2. *c.* 36. 30 *G.* 2. *c.* 2 *ſ.* 14.

Concerning juſtices. 7 *J.* 1. 24 *G.* 2. *c.* 44.

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Concerning inſolvent debtors. v. 32 *G.* 2. and v. 5 *G.* 3. 9 *G.* 3. *c.* 26. 12 *G.* 3.

Of limitation.

21 *Ja.*

21 *Ja. c.* 16. v. *Aſſumpſit.*
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Vide 23 *G.* 2. againſt ſeducing artificers. p. 394.
Concerning repair of bridges. v. 22 *H.* 8. *c.* 5. v. *Juſtices.* v. p. 238.
Concerning rogues incorrigible. v. 12 *A.* 13 *G.* 1. *c.* 23. *ſ.* 8. v. p. 342.
Concerning ſervants. 5 *Eliz.* *c.* 4.
Set off 2 *G.* 2. *c.* 22. *ſ.* 13. 5 *G.* 2. *c.* 30. *ſ.* 28.
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Trial 14 *G.* 2. *c.* 17.
For felony, where the party eſcapes into another county and the goods are found. v. 24 *G.* 2. *c.* 55. 13 *G.* 3. *c.* 31. *ſ.* 4. *v.* alſo. 2 & 3 *E.* 6. *c.* 24.
Concerning uniformity. 13 & 14 *Car.* 2. *c.* 4.

Summary Proceedings.

Muſt proceed upon mutual benefit and equity. 329.

Sunday.

Appears not a good day for appointment of overſeers. *v.* 618 to 620.

Superſedeas.

Writ of error is not a ſuperſedeas to execution, unleſs bail be put in within four days. 752.

Sweeping Clauſe.

Will not carry eſtates of a different nature from thoſe expreſſed in the premiſſes. v. 398, 399.

Taxes.

On a ſpecial verdict; action for money had and received.

The jury find the iſland of *Grenada* in the poſſeſſion of the *French*, and conquered by the *Britiſh* arms in 1762: They find it ſurrendered upon articles of capitulation on the 7th of *February* in the ſaid year.

And that by thoſe articles they are recognized as BRITISH SUBJECTS and to be governed, by their then PRESENT laws, until his Majeſty's pleaſure ſhould be farther known; they are to enjoy their property and the ſame *privileges* as in the other leeward iſlands. And as to what relates to taxes and impoſts, they are referred to the 6th article, which gives them as above mentioned the ſame privileges with the leeward iſlands. And the natives may ſell their lands, provided it be to *Britiſh ſubjects*, and retire.

They find the treaty of peace of the 10th of *February* 1763, ceding *Canada* or *Acadia*, and the iſlands amongſt which *Grenada*, to the King and crown of *Great Britain*.

And they find a PROCLAMATION of the King of *Great Britain* the 7th of *October* 1763, promiſing a legiſlative aſſembly as ſoon as the ſtate and circumſtances of the new governments (amongſt which *Grenada* is included) would admit; and that in the meanwhile perſons inhabiting, or *reſorting* to the ſaid colonies may confide in the royal protection, for the enjoyment of the benefit of the *Engliſh* laws, for the adminiſtration of which courts of judicature are ordered to be erected.

They find alſo a proclamation of the 26th of *March* 1764, directing a ſurvey of the iſland, and a diviſion into pariſhes and diſtricts; with other proviſions for the ſettlement and beneficial culture thereof.

And farther they find LETTERS PATENT of the 9th of *April* 1764, appointing *Robert Melville*, Eſq; to be governor of GRENADA, the *Grenadines*, *Dominica*, *Tobago* and *St. Vincents*; and directing him

him to govern according to his inſtructions received and to be received, and according to ſuch reaſonable LAWS as ſhall be made, by the *advice* and CONSENT of the COUNCIL and ASSEMBLY of the ISLANDS under his government; and empowering him with the advice and conſent of COUNCIL, and *as ſoon as circumſtances ſhall admit, and when, and as often as need ſhall require to ſummon and call* GENERAL ASSEMBLIES *of the ſaid iſlands, jointly* or *ſeverally*, to be choſen by the authority of the freeholders reſpectively; and to the GOVERNOR and COUNCIL, with the advice and conſent of the ASSEMBLY, to make LAWS for the welfare, peace and good government of the ſaid iſlands, jointly or ſeverally, as near as may be according to the laws of *England*.

And they find that Governor *Melville* arrived in the iſland on the 14th of *December* 1764.

And that an aſſembly of the ſaid iſland was held in the latter end of the year 1765.

But they farther find that his Majeſty by his letters patent of the 20th of *July* 1764, ordered and appointed an IMPOST or CUSTOM of four and an half in ſpecie for every hundred weight of all dead commodities of the produce of the ſaid iſland of *Grenada*, that ſhould be ſhipped off from the ſame, in lieu of all cuſtoms and impoſts upon goods exported and imported under the authority of the *French* King; reciting that ſuch impoſt is paid by *Barbadoes*, and the other leeward iſlands, and commanding the governor and officers of the cuſtoms from time to time, for the time being to *collect* and *receive* the ſame under ſuch penalties and forfeitures; and in ſuch manner as in the above mentioned leeward iſlands, and appointing the continuance of the poll-tax levied under the *French* King.

And the jury find the ſaid impoſts of four and and half *per cent.* as above mentioned was and is paid in the iſland of *Barbadoes*, and in the leeward *Carribee* iſlands, by virtue of ACTS OF ASSEMBLY of the ſaid iſlands ſet forth in the verdict.

And they find the eſtabliſhment of a *cuſtom-houſe* and officers in the iſland of *Grenada*.

And they farther find that the plaintiff is a *natural born ſubject* of the King of *Great Britain*; and that on the 3d of *March* 1763, he purchaſed a plantation in the ſaid iſland, in purſuance of the articles of capitulation and treaty of peace.

And they alſo find that certain ſugars of the plaintiff of the growth of the ſaid iſland *ſubſequent* to the grant, and regiſtering of the letters patent of the 20th of *July* above mentioned, were *ſhipped off from thence*; and that the defendant, being then and there a collector of the ſaid duty for the uſe of his Majeſty, received the ſame; and that the ſame is the money mentioned to be had and received to the plaintiff's uſe for which the action is brought; and that the defendant *hath not paid over the ſame to the uſe of his Majeſty*, but *on notice* of the action intended to be brought hath

with the conſent of his Majeſty's attorney-general KEPT the ſame in his hands, for the purpoſe of *trying* the queſtion ariſing upon the facts.

And whether the ſaid IMPOST were *lawfully impoſed* or *not*, the jurors are ignorant and pray the *advice* of the court.

And if upon the whole matter found it ſhall appear to the court, that the impoſt or cuſtom aforeſaid was *not lawfully impoſed*; then they ſay the defendant did *undertake and promiſe*, as the defendant has in his plea alleged; and aſſeſs the plaintiff's *damages* at 5*l.* and coſts at 40*s.*

But if the court be of opinion the impoſt was *lawful*, then they find the defendant did *not undertake* in manner and form as by the plaintiff in his plea alledged. *v.* the caſe and arguments from 655 to 738.

Determined by the court.

1ſt. That the KING by his prerogative might, BEFORE the proclamation of the 7th of *October* 1763, have laid the IMPOST in queſtion upon *Grenada* as a conquered country,—*without conſent* of the *parliament* of *England*, or *act* of the people of *Grenada*, in their *aſſembly* or otherwiſe,—by his PREROGATIVE.

But 2d. that AFTER the *ſaid* PROCLAMATION, and BEFORE the PATENT of the 20th of *July* 1764, for laying on the IMPOST, the KING had PRECLUDED himſelf from ſo doing; and therefore that the ſaid IMPOST was VOID. 738 to 748.

Tenants.

1. In common, though ſeveral, are but as one perſon or party in law. 401.
2. The poſſeſſion of *one* is the poſſeſſion of the *other*, and will prevent a bar being incurred under the ſtatute of limitations; but not ſo where the poſſeſſion of one has been *adverſe* to the *title* by tenancy. 768, 769. v. *Actual ouſter.*

Teſtament.

Diſtinction between will and teſtament. v. *Will.*

Toll.

Toll for CORN *malt* ſhall be conſidered as corn; becauſe the acts of parliament have ſo conſidered it, otherwiſe the *ſpecification* makes it a new thing; and therefore *flour* was *not* liable. 72.

Of a lighthouſe not *rateable*, becauſe the toll is not *locally* related to the pariſh. 78.

For toll traverſe a conſideration muſt be laid. 464.

Where a conſideration is laid you muſt prove it as laid; even in caſes where it was unneceſſary to have laid any. 464.

Conſideration of being *bound* to repair good, without alledging *actual* reparation. 465.

After *verdict* conſideration will be *preſumed*, either the *ſame* as laid, or a *good* one. 465.

Trial.

Slight cauſes of delay will not be allowed after notice given of trial. 58.

Where the evidence is *poſitive*, and greatly preponderates on one ſide, the court will not incline to grant a new trial in the firſt inſtance, but you may indict the witneſs of perjury. 87, 88.

Trial at bar will not be granted where the party applying refuſes to conſent to the uſual terms of mutual juſtice and convenience. 159.

Granted, and will be granted out of an *iſſuable* term upon proper occaſion. 159.

Trover.

1. Suppoſes a lawful coming by the goods demanded, and an unlawful converſion. 89.

Detention againſt lawful demand preſumes converſion. *ibidem.*

2. Trover is good to recover where a felon has ſtolen goods, and changed them into notes, if the note clearly appears to be the product of the ſpecific goods; and the owner of the goods, who has proſecuted to conviction, and has omitted to pray *reſtitution*, ſhall recover them in trover, though ſeized into the hands of the king, by an action againſt the ſheriff. 89, 90.

3. *A.* buys plate of *B.* the defendant, and gives him a draft; for which *A.* gives receipt as for *caſh*. *A.* pawns the plate to *C.* the plaintiff, who was a pawnbroker, ſhewing him the receipt as evidence of his title, on which *C.* took the goods in pawn. The draft turned out afterward to be a bad one; for *A.* had no money with the banker. *A.* was tried on the ſtatute for procuring under falſe pretences on an indictment preferred by the defendant *B*; he was *convicted*, *C.* the plaintiff producing the goods. *B.* the defendant, upon this took and detained them; *A.* brought his action of trover thereupon—And held “ that he ſhould recover; for that the property was not changed as againſt the *right*

“ *owner*, either at *common-law*, or by the ſtatute of *James* reſ-“ pecting pawnbrokers. 187.

4. *A.* the plaintiff agrees to exchange the *Folly*, his own veſſel, with the *Roker*, the plaintiffs, and to give twenty-five guineas to boot; and, if the *Folly* was loſt in the voyage ſhe was THEN upon, thirty guineas: Beſides, the plaintiff paid a guinea EARNEST.

Defendant wrote to excuſe himſelf, that he could not make the exchange becauſe he had ſold the veſſel; plaintiff tenders twenty-four guineas, deducting one for earneſt; defendant refuſes. Afterwards in ANOTHER voyage the *Folly* is loſt, and plaintiff brings the action for the value. Held, the action *well* lay for the *delivery* was *complete* by payment of the EARNEST, and the defendant's detention of the veſſel afterward was *tortious*. 219 to 221.

5. Plea of general releaſe ſufficient in bar of trover. 323.

6. *A.* aſſigns to *B.* and *C.* *B.* ſells to *D.* who gives a promiſſory note payable in fourteen days; after this *D.* aſſigns to *E.* all his goods. The note never having been paid, *B.* refuſes to deliver. The poſſeſſion of the ſeller, after the agreement and note, is the poſſeſſion of the buyer, and trover will well lie for the goods, eſpecially as *B.* being deſired by *D.* to take back the goods, ſaid “ I will not, I will have *payment*, which *affirmed* the ſale. 325, 326. v. *Larciny*.

Truſtee.

Cannot vary the mode of ſale preſcribed. 66, 67. nor the ſecurity preſcribed. 492, 493.

Tythes.

Modus ſet up ſince the 13th of *Eliz.* binds not the ſucceſſor. 66.

Temporary compoſition requires notice to determine. 66.

Endowment of tythes without uſage fails. *ibidem.*

Claim of more tythes than there are tytheable goods. *ibid.*

Miſpleader of a *modus* it ſeems produces a decree in kind but without prejudice. *ibid.*

Action for double damages for tythes, uſed as a method of trying the right, and not conſidered as a penal action. 232 to 234.

Undertaking.

Held ſo far *revocable* before ſigning, that an attorney, who had written but refuſed to ſign it, ſhould not be liable to action for non-performance. 193.

Univerſity.

The court will have an eye to its diſcipline, where it takes cognizance of a cauſe from it, as out of it's juriſdiction. 42.
Vide *Maſter and Fellows.*

Uſage.

Good to explain *doubtful* words in a charter. 77.

Uſury.

Computation upon an uſurious contract held good from the time of payment, to take the cauſe of action out of the ſtatute of limitations. 51.
Where the object of a contract is borrowing and lending of money at more than the legal intereſt, no ſhift, colour or contrivance, will take the agreement out of the ſtatute; but if the ſubſtance be a ſale or other fair tranſaction, and the party buying may pay whenever he pleaſes at a fair price, and has credit given him in the courſe of trade, but if he does not pay within the time, then he is to pay an advanced ſum of ſo much *per cent*, this will not be uſury becauſe it is contingent, and in the nature of a penalty for the delay, and a compenſation for the riſque. 595 to 600.

Vagabond.

Who he is, how to be puniſhed, and by whom. *v.* 85.

Variance.

Between judgment and writ of error, the addition in the writ being "Eſquire," and in the judgment "Gentleman." *v.* 272.

Venue.

That not in *tranſitory* only but in LOCAL actions the court will change the VENUE, if there be *an urgent call of juſtice,* not *otherwiſe* to be anſwered. *Per* Lord *Manſfield.* 50.

After your plea pleaded, you are not to move to change it. 321.

The plaintiff has his election in tranſitory actions; the defendant cannot change to a county where the cauſe did not ariſe, except upon ſpecial circumſtances. 395.

Change not to be ſo granted as to operate unneceſſary delay. 395.

Verdict.

A verdict ſhall be ſet aſide for exceſſive damages, where the jury have gone out of the caſe. *v.* 28, 29.

Difference of opinion amongſt the jury, and they agree the majority ſhall decide—verdict good. 71.

Where the verdict is miſtaken in bar, form or mere circumſtance by the miſpriſon of the clerk it ſeems this may be amended; otherwiſe where it is a variance of *ſubſtance*, as to the point of law or form *eſſential* to maintaining the caſe. 147.

It ſeems where a ſpecial caſe has been reſerved, a new trial has been granted without previouſly ſetting aſide the verdict. 451.

Court muſt judge upon facts found. 573. v. *Evidence.*

Villenage.

The laſt confeſſion of villenage 335 years, from this preſent year 1776. v. p. 19. v. *Slavery.* v. *Harris's Juſtinian*, l. 1. tit. 3.

Wager.

Equal wager between parties to a cauſe touching its event, with a view to mutual indemnification in ſome degree againſt the loſs, held not a contempt of the court in which the cauſe was depending; not immoral; not illegal. 383 to 388.

Warrants.

To break open houſes under a general warrant for apprehending the authors, printers and publiſhers, of a ſeditious libel, without names of the offenders, is illegal. v. *Wilkes*'s caſe. p. 17 to 20.

Warrant under due authority excuſes the officer, 236, otherwiſe where the perſon who iſſued the warrant had no authority over the matter.

A Table of the Principal Matters.

Warrantry of Goods.

General warranty that an horſe is ſound, is without exception of ignorance of the ſeller at the time of ſale. 146.

Wheat.

If a man, who practices keeping of barley for the purpoſe of diſtilling contrary to the prohibition of the ſtatute, mixes wheat with it, he is liable to have both ſeized; (and was before the ſtatute had made expreſs proviſion) and ſetting up a mill for colour will not exempt him. 179 to 182.

Will.

Will operates by our law as an appointment of uſes, according to which the teſtator means the lands ſhould go after his death, and therefore muſt be of lands in poſſeſſion at the making of the will, unleſs he expreſsly ſays, (or whereof I ſhall be hereafter ſeized) and it is not like a ſubſtitution of an executor by teſtament of perſonal, or of univerſal heir, as to realty as by the *Roman* civil law; and therefore a new will does not with us neceſſarily import a revocation of the old. *v.* 574.

Where a fee paſſes without expreſs words of limitation. 95, 96. 100.

Intention to be found out from the whole of the will. 97.

A deviſe over ſhall take effect where a contingency, ſuppoſed, precedent has never happened. 97.

1. *T. M.* ſeized of lands in diverſe counties holden in common fee, and of certain cuſtomary lands in 1723, makes a ſettlement in conſideration of marriage to himſelf for life, remainder to truſtees for the uſual purpoſes, remainder to his heirs male by his wife, reverſion to himſelf in fee, with proviſion for raiſing portions for younger children.

After the marriage he purchaſes diverſe other lands freehold and copyhold, and in 1725 mortgages a part of his freehold, and in 1731, having four children, two of each ſex, makes his will, gives his jewels to his wife for life, remainder to his ſon *W.* and if he die without iſſue, remainder to his ſon *E.* abſolutely; like limitation of the furniture of his capital manſion-houſe—his perſonalty to be applied in payment of debts and legacies.

Directs his ſon to ſurrender the *cuſtomary* eſtates in borough *Engliſh* to his brother; gives to his *youngeſt*, *Edward*, the eſtates in *gavelkind* in tail-male; remainder to the eldeſt ſon in tail-male; remainder

remainder

mainder to ſuch *ſon* as ſhall be born to the teſtator after his deceaſe: like limitation of his *freehold* eſtates in *M.* and *G*; only the elder preferred before the younger; and if it ſhall ſo happen that his ſaid ſons *W.* and *E.* and *any after-born* SON ſhall die without iſſue-male of their bodies, *then* and in *ſuch* caſe, and for want of ſuch iſſue of his ſons then living, and of any ſon or ſons lawfully begotten and hereafter to be born, the reſt and reſidue not before diſpoſed to his brother *J. M.* for life, remainder to truſtees (for the uſual purpoſes), remainder to *J. M.* the younger for life, remainder to the heirs-male of his body; remainder to *C.* the ſecond ſon of his brother, with remainders as before; REMAINDER to his own right heirs in fee.

And he appoints his wife executrix and guardian of the children together with her and his own brother.

Power to his eldeſt and alſo to his youngeſt ſon to make leaſes for payment of portions, and raiſing jointures, when they come into poſſeſſion reſpectively; and ſo, in like manner, to his brother, *&c.* and his heirs-male, as they ſhould reſpectively come into poſſeſſion.

Words relating to the after-born iſſue were *interlined*, and not noticed in the atteſtation.

No after-born iſſue came into being; nor any iſſue but thoſe at the time of making the will.

Held, that the deviſe over to his brother was good, either as an immediate deviſe of the reverſion under the ſettlement, after failure of iſſue of the marriage;

Or elſe as a remainder after eſtates-tail, by implication to afterborn ſons of another marriage.

Or 3dly, as a deviſe upon a double contingency; namely, if my ſons by the now marriage die without iſſue, and if my ſons by this or any other marriage die without iſſue, then over to my brother, and the latter contingency having never happened, that the deviſe over ſhould be good. *v.* from 160 to 178.

The beſt rule in the conſtruction of wills, *v. Conſtruction.*

2. *J. L.* makes his will in 1748, being ſeiſed of chambers in *Lincoln's Inn*, and a conſiderable ſum of money ariſing from lands which were ſold under an act of parliament, and were to have been re-veſted in land, but were not, and he was tenant in tail, reverſion to himſelf in fee under the ſettlement in the intended lands; and he deviſes to his dearly beloved friend Mrs. *F. H.* all his real and perſonal eſtate, whatſoever and whereſoever, ſubject only to two or three ſmall pecuniary legacies, one of which is to his neice and heir at law.—Afterwards in 1756 the jury find that he made *another* will in writing, duly executed, and atteſted by *three* ſubſcribing witneſſes, and that the diſpoſition of the ſaid will of 1756 was *different* from the will of 1748, but in what reſpects they know not; and what is become of it they know not: and they

further ſay, that they do not find the teſtator cancelled, or the defendant; the general deviſe deſtroyed it.

The Lord Chief Juſtice *De Grey*, Mr. Juſtice *Gould*, and Mr. Juſtice *Nares*, held this a revocation; and that the firſt will was barred by the ſecond; that the heir not claiming under either will was not bound to ſhew it, but the deviſee muſt ſhew the ſecond was not againſt her, and that the will being ſubſcribed by three witneſſes muſt be taken to have been of real eſtate, and therefore to be a revocation of the former real deviſe; and the difference found muſt be taken to be a general difference, or at leaſt would put the deviſee to her title, which if ſhe did not prove in what extent it ſubſiſted, would be bad for the whole for the uncertainty; for that the heir having a clear, certain, abſolute title, it muſt be defeated by a certainty, and the will which defeats it muſt appear to be the laſt will of the teſtator.

On the other hand, Mr. Juſtice *Blackſtone* and all the judges of the the Court of King's Bench were of opinion,

That the finding muſt be taken as it is, being as full as the jury could make it upon the evidence.

That, by the caſe of *Hitchins* and *Baſſet*, *another* will does not neceſſarily *revoke* the former; it may conſiſt with it. That a *difference* does not import a revocation; for it may be as to ſome particular not affecting the general ſcope of the will nor the title of the general deviſe; that when the deviſee ſhews a title by deviſe, that title is a clear certain title, no leſs than of the heir by deſcent; and muſt ſtand, as his did before, till certainty be ſhewn againſt it;

That the ſtatute of frauds meant to guard againſt all *conſtructive* deviſes, not reſulting from the neceſſary act of law, or the declared ſolemn intent of the party duely expreſſed and atteſted according to the ſtatute; and that therefore revocations, which were ſtrictly interpreted even at common law, and not extended by latitude of conſtruction to defeat an eſtabliſhed will, were not now to be implied and collected by conjecture, ſince the ſtatute. *v.* 282 to 300. and 558 to 576. And the Houſe of Lords affirmed the judgment of *B. R.* ibid.

3. Limitation to *all* and every my daughter and daughters, and the heirs of her and *their* bodies, and on failure of all and every the daughters aforeſaid, and all and every their iſſue, limitation overheld, they took croſs remainders, 443 to 450.

4. “ In caſe my *perſonal* eſtate, which I have before deviſed to my
“ wife, ſhall not be ſufficient, I deviſe my lands in *A.* for payment
“ of debts: and, if not ſufficient, the reverſion of my wife's jointure to be liable; all the reſt and *reſidue* of my real and perſonal
“ eſtate I give to my wife;”

The perſonalty *was* ſufficient for payment of debts.

Held, that either the wife took the real eſtate as not deviſed from her at all, being only deviſed on a contingency which never happened of the perſonalty being inſufficient for payment of debts;

Or 2d, that there was a *reſulting* truſt for her benefit in *ſo much* of the *real*, as ſhould be ſurplus after payment of debts not ſatisfied by the perſonal. And that this in the event being the *whole*, ſhe was intitled to the whole. 452 to 455.

5. " Whereas my wife is now pregnant, if ſhe bring forth a ſon, I deſire he may have my eſtate when he comes to 21 years, paying (certain annuities expreſſed in the will): but if ſhe has a daughter, a moiety to my wife; the other moiety to my two other daughters, ſhare and ſhare alike; if *either* of them die before twenty-one, then ſurvivorſhip to the daughter; but if both die before twenty-one, then the *whole* to my wife."

No ſon was born, nor any daughter: the daughters in being died without iſſue under age.

Held, that the wife ſhould take the whole, as if the contingency of a ſon or daughter being born and dying as expreſſed above, had happened, the *intent* being, that on *want* of iſſue the wife ſhould take, whether on failure of ſuch as were expreſſed, after they ſhould have come into being, or on their never exiſting. 455—457.

6. *A.* makes his will in 1759, and at the ſame time executed and publiſhed an exact *duplicate*: the teſtator was a labouring man, and ſaid he did it to make his wife eaſy who was near her death, but that it was not a will to his liking. The duplicate was left with his daughter.

He afterwards ſends for his attorney, tears off the ſeals, and orders the witneſſes names to be cut out; which was done in his preſence. He made a new will the ſame day, with expreſs clauſe of revocation, and gave it the attorney to keep, ſaying he would not have the heir find it.

Afterwards, being in his ſenſes, he ſent for his ſecond will, and ordered the attorney to come and make a *new* one: the will is ſent; but before the attorney came, the teſtator was out of his ſenſes, and died the ſame day without making any other will.

The ſecond will was found cancelled after his death, together with the firſt *cancelled*, both in one paper: the *duplicate* of the firſt was found *uncancelled* in one of his drawers *after* his death, but uncertain *when* or *how* it came there;

Held, that the *cancellation* of the firſt will in his own poſſeſſion was a full and effectual *revocation* both of it and of the duplicate; both being but *one* will, and the duplicate *out* of his poſſeſſion: and farther, that the revocation of the ſecond will did not in this caſe ſet up the *firſt*, the firſt not being ſimply *revoked*, but *deſtroyed* by the *cancellation*. 465 to 471.

7. *A.* in 1732 being ſeiſed of diverſe premiſſes, freehold and copyhold, and intitled to other copyhold as mortgagee, makes his will, and deviſes all his freehold and copyhold, *&c.* to his wife; afterwards he *purchaſes* the copyhold which he had as mortgagee, and in 1735 ſurrenders to uſes *declared* and to be *declared* by his laſt will and teſtament in writing. And in *February* 1736, he ſtrikes

out of his will a legacy to the poor of *H*—— and enters a memorandum, atteſted by two witneſſes, that it was ſtruck out by his order and in his preſence, he having paid it in his life-time;

Held, that by the ſurrender the copyhold purchaſed after the will made, well paſſed, as amongſt the uſes which the teſtator in his will had ſaid were declared.

That as to the ſecond point, it was unneceſſary to conſider whether republication or not; nor equally clear; but that it ſeemed the ſtriking out of the legacy was a republication of the will as to the reſt not altered. 604 to 608.

V. *Deviſe*, *Double Legacy*, *Croſs Remainder*, *Revocation*, *Republication*, *Reſiduary Clauſe*, *Sweeping Clauſe*, *Codicil*, *Conſtruction*, *Executor*, &c.

Witneſs.

Who may be a witneſs. *v.* 183.

A man may be received as a witneſs who proves his own turpitude: it goes not to his *admiſſibility* but his *credit*. 757—758.

Affidavit to put off trial for abſence of material ——— That *A.* is a material witneſs in the cauſe, and is major of a regiment, which regiment is beyond ſea at ſuch a place, held bad—though perhaps it might have done, if there had appeared to have been merits. 187 to 188.

Affidavit to put off trial for want of a material ——— muſt be full to the cauſe, and ſhew that you have ſuch a witneſs who is material to the cauſe, and that there are reaſonable hopes of producing him, if the trial be put off, *v.* 653. *et alibi*; and you ſhould be ready to admit neceſſary facts that only are of form to be proved by witneſſes. 769.

Words.

Moſt of the diſputes in the world rather about words than things. 176.

Affidavit that they the deponents *nor* any of them *never* received— held a good and ſufficient denial; and that if falſe, and they had received, the words were full enough to ſubject to an indictment of perjury. 275.

General words after ſpecial uſually refer to things *ejuſdem generis*, of the ſame nature with the antecedent. 324 and 325.

Writ.

Writs, double, not allowed by the court. 248.
Of enquiry—in a caſe to determine what was due from a maſter to his clerk;—ſuggeſtion, that the jury at *Guildhall* were low and indigent and not proper judges, and therefore prayer, that it might be executed in *London*—*diſcharged*. 65.
Of error—where faulty, whether to amend, or ſue out a new one. 272.
Ought not to be diſturbed on motion. 653, 654.
Sued out before judgment. *v. judgment*.

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